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Nos. 04-104 and 04-105

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FREDDIE J. BOOKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, PETITIONER

v.

DUCAN FANFAN

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

2. If the answer to the first question is "yes," the following question is presented: whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

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OPINIONS BELOW

The opinion of the court of appeals in *United States* v. *Booker* (04-104 Pet. App. 1a-27a) is reported at 375 F.3d 508. The sentencing proceedings in *United States* v. *Fanfan* (04-105 Pet. App. 1a-13a) are unreported.

JURISDICTION

The judgment of the court of appeals in *United States* v. *Booker* was entered on July 9, 2004. The judgment of the district court in *United States* v. *Fanfan* was entered on June 30, 2004 (04-105 Pet. App. 16a-21a), the notice of appeal was filed on July 16, 2004 (*id.* at 26a), and the case was docketed in the court of appeals on July 19, 2004 (*id.* at 27a). The petitions for a writ of certiorari were filed on July 21,

2004, and were granted on August 2, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2101(e).

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

The relevant constitutional, statutory, and Sentencing Guidelines provisions are set forth in appendices to the petitions. 04-104 Pet. App. 33a-68a; 04-105 Pet. App. 28a-63a.

STATEMENT

1. The Federal Sentencing Guidelines system

a. "From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion." *Apprendi* v. *New Jersey*, 530 U.S. 466, 482 n.9 (2000) (quoting Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 9-10 (1998)). "Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long." *Mistretta* v. *United States*, 488 U.S. 361, 363 (1989). With the rise of rehabilitation as a goal of sentencing, some legislatures, including Congress, also adopted systems in which the actual period of imprisonment was left largely to parole boards and other officials outside of the courts. *United States* v. *Grayson*, 438 U.S. 41, 46-48 (1978); Parole Act, ch. 387, 36 Stat. 819 (1910). In the exercise of sentencing discretion, judges traditionally considered "aggravating and mitigating circumstances surrounding an offense" in order to determine the appropriate sentence within broad statutory limits. *United States* v. *Grayson*, 438 U.S. at 46. And as long as the sentence fell within the statutory range set by Congress, the sentence imposed by the district court as a matter of its discretion was given "virtually unconditional deference on appeal." *Mistretta*, 488 U.S. at 364.

Almost from its inception, wholly discretionary sentencing met with criticism, much of it severe, from commentators,[1] Attorneys General,[2] and federal judges.[3] The criticism focused on the gross disparities in the sentences imposed on similar offenders for similar offenses. This concern was later validated by empirical studies. See S. Rep. No. 225, 98th Cong., 1st Sess. 41-46 & nn.18-27 (1983) (Senate Report). Some studies suggested that disparities were not only arbitrary, in that sentences varied from circuit to circuit, district to district, and judge to judge, but also invidious, in that minority defendants were at times sentenced more harshly than similarly situated whites. See *Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1473, 1630-1632 & nn.35-44 (1988).

In his 1972 book, *Criminal Sentences: Law Without Order*, Judge Marvin E. Frankel of the Southern District of New York captured the thinking of many critics when he wrote that the "almost wholly unchecked and sweeping" discretion of sentencing judges was "terrifying and intolerable for a society that professes devotion to the rule of law." *Id.* at 5. Judge Frankel proposed an expert commission that would "prescribe in rules of general application the factors to be considered in individual sentences," and thereby bring a measure of uniformity, rationality, and fairness to sentencing. *Id.* at 123. Judge Frankel's ideas had a great influence on Congress. See, *e.g.*, 121 Cong. Rec. 37,562-37,563 (1975); Senate Report 37. In 1975, Senator Kennedy intro-

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[1] See, *e.g.*, *Long v. Short Sentences*, 20 Wash. L. Rep. 135 (1892); Charlton T. Lewis, *The Indeterminate Sentence*, 9 Yale L.J. 17 (1899).

[2] See United States Dep't of Justice, *Annual Report of the Attorney General of the United States* 6-7 (1938) (Att'y Gen. Cummings); *id.* at 6-7 (1939) (Att'y Gen. Murphy); *id.* at 5-7 (1940) (Att'y Gen. Jackson); *id.* at 4 (1941) (Att'y Gen. Biddle).

[3] See, *e.g.*, *Shepard* v. *United States*, 257 F.2d 293 (6th Cir. 1958) (Stewart, J.); Symposium, *Appellate Review of Sentences*, 32 F.R.D. 249 (1962).

duced a bill that authorized the appointment of a commission to promulgate sentencing guidelines. See S. 2699, 94th Cong., 1st Sess. (1975). Bills with similar provisions were introduced in each of the next three Congresses, see S. 1437, 95th Cong., 1st Sess. (1977); S. 1722, 96th Cong., 1st Sess. (1979); S. 1630, 97th Cong., 1st Sess. (1981), but did not become law because of disagreement over comprehensive criminal-code reform, which had also been under consideration during the same period. When sentencing reform was finally uncoupled from criminal-code reform, Congress passed the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

b. As this Court has described it, the Sentencing Reform Act was a response to what Congress viewed as "two 'unjustifi[ed]' and 'shameful' consequences" of the indeterminate-sentencing system. *Mistretta*, 488 U.S. at 366 (quoting Senate Report 38, 65). The first was "the great variation among sentences imposed by different judges upon similarly situated offenders." *Ibid.* The second was "the uncertainty as to the time the offender would spend in prison," because of the possibility of release on parole before the end of the term imposed by the judge. *Ibid.*

The Sentencing Reform Act has several components that further the goals of uniformity and certainty. First, the Act established the United States Sentencing Commission as an independent agency in the Judicial Branch, and directed it to promulgate guidelines to channel the discretion of sentencing judges. 28 U.S.C. 991, 994, and 995(a)(1). The Act provided instructions to the Commission, including that, as a starting point in developing guidelines, the Commission ascertain the average sentences imposed in particular categories of cases under the old system. 28 U.S.C. 994(m). Second, the Act made the guidelines binding on district courts, except when there is an aggravating or mitigating circumstance not adequately considered by the Commission, in which case a court is permitted to depart from the applicable guidelines range. 18 U.S.C. 3553(a) and (b). In no event, however, can a guidelines sentence be outside the statutory limits set by Congress. 28 U.S.C. 994(a) and (b). Third, the Act authorized defendants to appeal a sentence above the guidelines range, the government to appeal a sentence below the guidelines range, and either party to appeal an incorrect application of the guidelines. 18 U.S.C. 3742(a) and (b). In reviewing a guidelines sentence, appellate courts are required to accept the facts found by the sentencing judge, unless they are clearly erroneous. 18 U.S.C. 3742(d) (Supp. II 1984) (currently codified as amended at 18 U.S.C. 3742(e)). Finally, the Act abolished parole and required defendants to serve the entirety of their sentences, minus any credit for "good time." 18 U.S.C. 3624(a) and (b).

c. The Guidelines promulgated by the Commission took effect in 1987, and have been revised continually since. Consistent with Congress's expectation that they would be "sufficiently detailed and refined to reflect every important factor relevant to sentencing for each category of offense and each category of offender," Senate Report 169, the Guidelines set 258 different sentencing ranges based on the combination of an "offense level" for the crime (ranging from 1 to 43) and a "criminal history category" for the defendant (ranging from I to VI). See Guidelines Ch. 5 Pt. A (Sentencing Table).

Calculating a defendant's offense level requires a district court to take account of various characteristics of the offense and the offender. A court first determines the applicable Guideline and a "base offense level" from Chapter Two. See Guidelines § 1B1.1(a) and (b). It then adds or subtracts levels based on "specific offense characteristics" in Chapter Two and makes upward or downward "adjustments" under Parts A, B, and C of Chapter Three.[4] See *id.* § 1B1.1(b) and

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[4] Part A provides for an increase based on the status of the victim; Part B provides for an increase or decrease based on the defendant's role

(c). If there are multiple counts of conviction, this process is repeated for each count; the counts are then "grouped" under Part D of Chapter Three and the offense level is adjusted accordingly. See *id.* § 1B1.1(d). At this point, and regardless of the number of counts, the offense level is decreased under Part E of Chapter Three if the district court finds that the defendant has accepted responsibility for his crime. See *id.* § 1B1.1(e). After calculating the defendant's criminal history category under Part A of Chapter Four, the court makes any further adjustments to the offense level required by Part B of Chapter Four.[5] See *id.* § 1B1.1(f). Once the court determines the final offense level and criminal history category, it consults a Sentencing Table in the Guidelines manual that sets forth the range of punishment for the defendant. The court must select a sentence within that range unless it determines that an upward or downward departure is warranted. See *id.* § 1B1.1(g)-(i). In calculating the offense level, the district court is required at virtually every step to consider all of the defendant's "relevant conduct," as determined by the court, even if it is not part of the offense of conviction. See *id.* §§ 1B1.2(a) and (b), 1B1.3.

2. Constitutional challenges to the Guidelines

a. Two years after they took effect, this Court, with only a single Justice in dissent, upheld the Guidelines against multiple constitutional challenges in *Mistretta* v. *United States*, 488 U.S. 361 (1989). The defendant in *Mistretta* raised a non-delegation claim and three separation-of-powers

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in the offense; and Part C provides for an increase based on obstructive conduct.

[5] See Guidelines § 4B1.1 (increase for "career offender"); *id.* § 4B1.3 (increase where crime was part of pattern of criminal conduct "engaged in as a livelihood"); *id.* § 4B1.4(b) (increase for "armed career criminal"); *id.* § 4B1.5(a)(1) and (b)(1) (increase for "repeat and dangerous sex offender against minors").

claims, one of which was that, by virtue of the Commission's placement in the Judicial Branch, the judiciary had been given legislative authority. In rejecting that contention, see *id.* at 384-397, the Court emphasized the differences between the functions of Congress and those of the Commission. It relied, in particular, on the fact that the Guidelines do not "bind or regulate the primary conduct of the public" or give the judiciary "the legislative responsibility for establishing minimum and maximum penalties for every crime," but instead "do no more than fetter the discretion of sentencing judges to do what they have done for generations—impose sentences within the broad limits established by Congress." *Id.* at 396.

b. In four cases decided in the decade after *Mistretta*, this Court rejected other constitutional challenges to the Guidelines, approving, in each case, a sentence enhancement based on facts found by the sentencing judge. In *United States* v. *Dunnigan*, 507 U.S. 87 (1993), the Court unanimously held that an increase in the offense level based on the district court's finding of trial perjury does not violate a defendant's right to testify on his own behalf. In *Witte* v. *United States*, 515 U.S. 389 (1995), the Court held that, when the district court increases the offense level on the basis of an uncharged drug transaction, the Double Jeopardy Clause does not prohibit a subsequent prosecution for that transaction. In *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), a summary reversal, the Court held that, when a defendant is found guilty of one drug transaction and acquitted of another, the Double Jeopardy Clause does not prevent the district court from increasing the offense level on the basis of the conduct underlying the acquitted charge, so long as it has been proved by a preponderance of the evidence. Finally, in *Edwards* v. *United States*, 523 U.S. 511 (1998), the Court unanimously upheld a Guidelines sentence where the judge had found that the object of a drug conspiracy was to distribute both cocaine and cocaine base, even

though the jury had not specified which drug underlay its verdict. The Court held that the absence of a jury finding on that issue was legally unproblematic, because the Guidelines sentences imposed were below the statutory maximum for a cocaine-only conspiracy.

c. Two years after its decision in *Edwards*, the Court decided *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). The defendant in *Apprendi* pleaded guilty to an offense with a statutory maximum prison term of ten years, unless it was carried out with a biased purpose, in which case the statutory maximum (under a different statute) was 20 years. After making a finding of biased purpose, the trial court imposed a sentence of 12 years. This Court held that the sentence violated the Due Process Clause and the Sixth Amendment, because it was inconsistent with the principle that, other than the fact of a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Two years later, the Court applied *Apprendi* in *Ring* v. *Arizona*, 536 U.S. 584 (2002), which held Arizona's death-penalty statute unconstitutional insofar as it permitted the sentencing judge, rather than the jury, to find the aggravating circumstances that made a defendant found guilty of first-degree murder eligible for the death penalty.

After this Court's decision in *Apprendi*, and indeed after its decision in *Ring*, every one of the twelve courts of appeals with criminal jurisdiction held that the Sixth Amendment does *not* require facts that increase a defendant's Guidelines offense level to be found by the jury, and that judicial fact-finding in the application of the Guidelines is therefore constitutional.[6] The appellate decisions reasoned

[6] See, *e.g.*, *United States* v. *Pettigrew*, 346 F.3d 1139, 1147 n.18 (D.C. Cir. 2003); *United States* v. *Casas*, 356 F.3d 104, 128 (1st Cir.), cert. denied, 124 S. Ct. 2405 (2004); *United States* v. *Luciano*, 311 F.3d 146, 153 (2d Cir. 2002), cert. denied, 124 S. Ct. 1185 (2004); *United States* v. *Parmelee*, 319 F.3d 583, 592 (3d Cir. 2003); *United States* v. *Cannady*, 283 F.3d 641, 649 & n.7 (4th Cir.), cert. denied, 537 U.S. 936 (2002); *United States* v. *Floyd*, 343 F.3d 363, 372 (5th Cir. 2003), cert. denied, 124 S. Ct. 2190 (2004); *United States* v. *Tarwater*, 308 F.3d 494, 517 (6th Cir. 2002); *United States* v. *Merritt*, 361 F.3d 1005, 1015 (7th Cir. 2004), petition for cert. pending, No. 03-10979 (filed June 18, 2004); *United States* v. *Banks*, 340 F.3d 683, 684-685 (8th Cir. 2003); *United States* v. *Ochoa*, 311 F.3d 1133, 1134-1136 (9th Cir. 2002); *United States* v. *Mendez-Zamora*, 296 F.3d 1013, 1020 (10th Cir.), cert. denied, 537 U.S. 1063 (2002); *United States* v. *Ortiz*, 318 F.3d 1030, 1039 (11th Cir. 2003).

that "the holding in *Apprendi* applies only when the disputed 'fact' enlarges the applicable statutory maximum and the defendant's sentence exceeds the original maximum," *United States* v. *Caba*, 241 F.3d 98, 101 (1st Cir. 2001), and that "the relevant 'maximum' under *Apprendi* is found on the face of the statute rather than in the Sentencing Guidelines," *United States* v. *Kinter*, 235 F.3d 192, 201 (4th Cir. 2000), cert. denied, 532 U.S. 937 (2001). Because the Guidelines cap the defendant's sentence at the maximum provided by statute for the offenses of conviction, see Guidelines § 5G1.1(a), a Guidelines sentence can never exceed the statutory maximum.

3. The present controversy

a. In *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), this Court relied on the principle announced in *Apprendi*, and applied in *Ring*, to hold that a sentence imposed under the Washington Sentencing Reform Act of 1981, Wash. Rev. Code § 9.94A *et seq.* (2000), violated the Sixth Amendment, because the court had found facts that permitted it to exceed the standard maximum term permitted by the state statutory guidelines system for the offense of conviction. The Court rejected the State's contention that the "statutory maximum" was not the standard guidelines term but the ten-year maximum for the offense set forth elsewhere in the State's statutes, explaining that "the relevant 'statutory

maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 124 S. Ct. at 2537. The Court "express[ed] no opinion" on whether its decision applied to the Federal Sentencing Guidelines. *Id.* at 2538 n.9.

b. Respondent in *United States* v. *Booker*, No. 04-104, was found guilty after a jury trial of possession of at least 50 grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii), and distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Under 21 U.S.C. 841(b)(1)(A)(iii), the maximum sentence for the possession offense was life imprisonment. Booker was sentenced before *Blakely* was decided. In calculating respondent's base offense level under the Guidelines, the district court held him responsible for 658.5 grams of cocaine base. It then increased the offense level based on a finding that respondent had perjured himself at trial. The resulting offense level was 38, which, when combined with a criminal history category of VI (respondent had 23 prior convictions), yielded a Guidelines range of 360 months to life imprisonment. The court imposed a prison term of 360 months. 04-104 Pet. App. 1a-2a; Gov't C.A. Br. 7-12; Sent. Tr. 7-11; PSR ¶¶ 27-49.

Shortly after *Blakely* was handed down, a divided court of appeals reversed and remanded for resentencing. 04-104 Pet. App. 1a-27a. The majority held that *Blakely* precludes a sentencing judge from increasing a defendant's offense level under the Guidelines on the basis of a fact that was not found by the jury or admitted by the defendant. *Id.* at 2a-11a. The majority expressed no view on whether, as applied to Booker, the Guidelines were invalid in their entirety or only insofar as they permit the sentencing judge to find facts that increase the offense level. *Id.* at 11a-13a. Judge Easterbrook dissented. He argued, *inter alia*, that *Blakely* does not apply to the Guidelines because they are not

statutes, and that delegating to a commission the authority to decide which facts justify an increased sentence within the statutory range is permissible for the same reason that such a delegation to judges is permissible. *Id.* at 18a-23a. He also argued that the Federal Guidelines differ from the Washington statutes because the Guidelines require "dozens of findings" that may either raise or lower the sentence, such that no finding can be said to give the defendant a "legal entitlement" to a particular sentence. *Id.* at 23a-24a.

c. Respondent in *United States* v. *Fanfan*, No. 04-105, was found guilty after a jury trial of conspiracy to possess with the intent to distribute and to distribute at least 500 grams of cocaine, in violation of 21 U.S.C. 846, 841(a)(1), and 841(b)(1)(B)(ii). Under 21 U.S.C. 841(b)(1)(B)(ii), the maximum sentence for those offenses was 40 years of imprisonment. Fanfan's sentencing occurred four days after *Blakely* was decided. In calculating his base offense level under the Guidelines, the district court held him responsible for 2.5 kilograms of cocaine and 281.6 grams of cocaine base. The court then increased the offense level based on its finding that respondent was an organizer, leader, manager, or supervisor in the criminal activity. The resulting offense level was 36, which, when combined with a criminal history category of I, yielded a Guidelines range of 188 to 235 months of imprisonment. PSR ¶¶ 1, 19, 24, 27; 04-105 Pet. App. 2a.

The court concluded that *Blakely* applies to the Federal Guidelines, and that respondent therefore could not be sentenced within the applicable range, because the drug quantity and respondent's role in the offense had not been found by the jury. The court instead determined that the appropriate offense level was 26, the level applicable to offenses involving 500 grams of cocaine (the amount found by the jury), which yielded a Guidelines range of 63 to 78 months. The court sentenced respondent to 78 months of imprisonment. 04-105 Pet. App. 4a-13a, 15a.

The government filed a motion to correct sentence, in which it argued that the court had committed clear error by severing the provisions of the Guidelines that it believed violated *Blakely* and applying the remaining provisions. The district court denied the motion. 04-105 Pet. App. 22a-25a.

SUMMARY OF ARGUMENT

I. *Blakely* does not apply to the Federal Sentencing Guidelines. *Blakely*, like its predecessors *Apprendi* and *Ring*, announced a rule barring a judge (absent the defendant's consent) from finding facts that raise a sentence above the otherwise-applicable *statutory* maximum sentence. The Guidelines do not create statutory maximums. Rather, they are the product of the Sentencing Commission, a body in the judicial branch. The Commission is not a legislature and does not perform legislative functions. The functions that it does perform are those that have historically been carried out by sentencing judges: defining the aggravating and mitigating facts that should be taken into account in setting a sentence within the statutory range. The Guidelines are not equivalent to graduated statutory offenses with different "degrees" of seriousness.

In a series of cases, this Court has consistently recognized the distinction between facts that increase a defendant's offense level under the Guidelines and facts that increase a statutory maximum, and it has consistently sustained a judge's power to find facts that raise the Guidelines sentence. Those cases confirm that the Guidelines do not establish statutory maximum terms, and their results cannot be reconciled with a holding that *Blakely* applies to judicial factfinding under the Guidelines.

If *Blakely* is read, however, to establish a broader rule that extends the Sixth Amendment jury-trial right to facts that increase the boundaries of a judge's sentencing discretion under the Guidelines, that aspect of *Blakely* should be reconsidered and rejected. Reading *Blakely* that broadly

would require the overruling of many recent decisions and would produce a rule for which there is no specific historical basis. It would also thwart Congress's considered judgment about the necessity of establishing a sentencing commission in the judicial branch to structure judicial sentencing discretion and to eliminate invidious and unwarranted disparities in sentencing.

II. If *Blakely* is held to apply to the Guidelines, the proper judicial response is to hold that the Guidelines as a whole are inapplicable in cases in which the Constitution would override the Guidelines' requirement that the district court find a sentence-enhancing fact. Courts would then exercise sentencing discretion within the congressional minimum and maximum terms, with the Guidelines providing advisory guidance. The alternative—administering the Guidelines through a series of jury verdicts on sentence-enhancing facts—would produce a system radically different from the one designed by Congress and the Sentencing Commission. Grafting jury-trial procedures onto the Guidelines would create a hybrid system that would not function in the manner intended by its creators (and in some cases could not function at all); would require extensive judicial lawmaking to implement; and would undermine a key premise of *Mistretta* and raise serious constitutional questions about whether the Sentencing Commission can effectively define offense elements that govern the primary conduct of citizens. Rather than attempting to reconceptualize the Guidelines as elements of federal crimes and to inject jury factfinding into a system clearly intended to channel *judicial* sentencing discretion, it should be left to Congress (and the Commission) to reconstruct a sentencing system that constitutionally achieves the congressional goals.

ARGUMENT

I. *BLAKELY* DOES NOT APPLY TO THE UNITED STATES SENTENCING GUIDELINES

Under the Fifth and Sixth Amendments, a defendant has a right to have a fact found by a jury, based on proof beyond a reasonable doubt, when the fact increases the statutory maximum sentence set by the legislature. Such a fact is the functional equivalent of an element of a greater offense than the one carrying the otherwise-applicable statutory maximum. *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000); see *Ring* v. *Arizona*, 536 U.S. 584 (2002); *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). That constitutional rule ensures that the legislature takes responsibility for deciding what penalties are, "in the legislature's judgment, generally proportional to the crime," and it thereby provides "structural democratic constraints" against "potentially harsh legislative action." *Apprendi*, 530 U.S. at 490-491 n.16 (internal quotation marks omitted). The question in these cases is whether the requirements of *Apprendi* apply to a fact that raises a defendant's offense level under the United States Sentencing Guidelines. The answer is no, because, unlike the statutes at issue in *Apprendi*, *Ring*, and *Blakely*, the Guidelines do not set statutory maximum sentences. If, however, the Court concludes that *Blakely* established a broader principle that the jury must now find any fact that raises the upper bound on a judge's sentencing discretion, including findings under the Guidelines, then that aspect of *Blakely* should be reconsidered and rejected.

A. The Requirements Of *Apprendi* Apply To A Fact That Increases The Statutory Maximum Sentence

1. In *Apprendi*, the defendant pleaded guilty to second-degree possession of a firearm. The New Jersey statute that defined that offense set a statutory maximum prison term of ten years, but under a different statute the maximum

sentence was 20 years if the defendant acted with a biased purpose. The trial court found, by a preponderance of the evidence, that the defendant had acted with a biased purpose and imposed a prison term of 12 years. This Court held that the fact of biased purpose was subject to the Constitution's jury-trial and proof-beyond-a-reasonable-doubt guarantees, and that the 12-year sentence was therefore unconstitutional.

The basis for the Court's decision in *Apprendi* was not that the judge's finding of biased purpose increased the defendant's sentence, but that it increased the sentence beyond the otherwise-applicable statutory maximum, such that it was the functional equivalent of a different, aggravated offense. That the decision rested on the narrower ground is clear from the Court's statement of its holding: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis added). The basis for the decision is also clear from the Court's reasoning. The Due Process Clause of the Fourteenth Amendment and jury-trial provision of the Sixth Amendment precluded the imposition of a sentence of more than ten years, the Court said, because those protections "entitle a criminal defendant to 'a jury determination that [he] is guilty of *every element* of the crime with which he is charged, beyond a reasonable doubt.'" 530 U.S. at 477 (quoting *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995)) (emphasis added). When a fact results in "an increase beyond the maximum authorized statutory sentence," the Court explained, "it is *the functional equivalent of an element* of a greater offense than the one covered by the jury's guilty verdict." *Id.* at 494 n.19 (emphasis added). Indeed, under those circumstances, the fact "fits squarely within the usual definition of an 'element' of the offense." *Ibid.* In *Apprendi*, therefore, the effect of a finding that the defendant acted with a biased purpose was

"to turn a second-degree offense into a first-degree offense." *Id.* at 494.[7]

The Court explicitly recognized that the jury-trial and proof-beyond-a-reasonable-doubt guarantees do *not* apply to facts that a judge relies on to increase a sentence to a level below the statutory maximum. The Court emphasized that it was not "impermissible for judges to exercise discretion —taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute," since, as the Court has "often noted," judges "have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case." *Apprendi*, 530 U.S. at 481 (citing *Williams* v. *New York*, 337 U.S. 241, 246-247 (1949)).

2. In *Ring*, a jury found the defendant guilty of first-degree murder. That verdict made him eligible for the death penalty under Arizona law, but only if the trial court found at least one of the ten aggravating circumstances enumerated in the statute. The trial court found two such circumstances and sentenced the defendant to death. This Court held the Arizona death-penalty statute unconstitutional under *Apprendi*, because it permitted the trial court rather than the jury to make the finding that increased the statutory maximum sentence from life imprisonment to death. Noting that "Apprendi's sentence violated his right to 'a jury determination that [he] is guilty of every element of the crime with which he is charged,'" 536 U.S. at 602 (quoting *Apprendi*, 530 U.S. at 477), the Court in *Ring* held that "Arizona's enumerated aggravating factors," like the "hate crime" enhancement in *Apprendi*, "operate as 'the functional

[7] *Apprendi* also noted that the ability of a judge to sentence in excess of the statutory maximum deprived defendants of notice by precluding their ability "to discern from the statute of indictment what maximum punishment conviction under that statute could bring." 530 U.S. at 483 n.10. Accord *id.* at 485 n.12.

equivalent of an element of a greater offense,'" *id.* at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19).

3. In *Blakely*, the defendant pleaded guilty to second-degree kidnapping involving a firearm. Under Washington's Sentencing Reform Act, second-degree kidnapping, when committed by someone with the defendant's "offender score," carries a sentencing range of 13 to 17 months of imprisonment, and, by virtue of a 36-month enhancement for possession of a firearm, second-degree kidnapping involving a firearm carries a sentencing range of 49 to 53 months. 124 S. Ct. at 2535. A sentencing judge could nevertheless impose a sentence of up to ten years, the maximum set by a different statute, if he determined that there was a reason for an "exceptional sentence." *Ibid.* The trial court found that the defendant had acted with "deliberate cruelty," a statutory basis for an exceptional sentence, and imposed a prison term of 90 months on the basis of that finding. *Id.* at 2535-2536. This Court held that the sentence violated the Sixth Amendment.

The Court began its analysis by stating that the case required it to apply the rule of *Apprendi*, and then quoted the familiar holding of that case: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely*, 124 S. Ct. at 2536 (quoting *Apprendi*, 530 U.S. at 490). After describing how that principle was applied in *Apprendi* and *Ring*, the Court found the principle to be applicable in *Blakely* as well, because the sentence exceeded "the 53-month statutory maximum" based on a finding of "deliberate cruelty" and the facts supporting that finding "were neither admitted by [the defendant] nor found by a jury." *Id.* at 2537. Rejecting the State's contention that the "statutory maximum" was ten years, the Court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of

the facts reflected in the jury verdict or admitted by the defendant." *Ibid.* (emphasis omitted). In other words, the Court said, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Ibid.* (emphasis omitted). The Court concluded that "[t]he 'maximum sentence' is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator)." *Id.* at 2538.

Blakely thus applied the rule of *Apprendi*: that a fact must be submitted to the jury if it increases the penalty beyond the "statutory maximum." 124 S. Ct. at 2536 (quoting *Apprendi*, 530 U.S. at 490). *Blakely* found that the relevant "statutory maximum" was not ten years but 53 months because, as in *Apprendi* and *Ring*, "one must start with the lowest statutory maximum and ask the jury to make findings that raise the sentence to which the defendant is exposed." 04-104 Pet. App. 19a (Easterbrook, dissenting). As the Fifth Circuit has explained, "[t]he sentencing scheme at issue in *Blakely*, like that involved in *Apprendi*, essentially established two distinct statutory maximum sentences"; in such a circumstance, "it makes sense to say that the legislature has effectively created distinct offenses." *United States* v. *Pineiro*, 377 F.3d 464, 473 (2004), petition for cert. pending, No. 04-5263 (filed July 14, 2004). Thus, just as a finding of biased purpose in *Apprendi* had the effect of "turn[ing] a second-degree offense into a first-degree offense," *Apprendi*, 530 U.S. at 494, and just as the offense of first-degree murder in *Ring* "is properly understood to be a lesser included offense of 'first-degree murder plus aggravating circumstance(s),'" *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 112 (2003) (opinion of Scalia, J.), *Blakely* effectively treated the Washington legislature as "having established three degrees of [the] kidnapping" offense of which the defendant

was convicted, with "the distinction between [the highest and the intermediate] * * * degree [being] deliberate cruelty," 04-104 Pet. App. 22a (Easterbrook, J., dissenting).

There is language in *Blakely* that could be read to suggest a broader rule. See 124 S. Ct. at 2537 ("the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts [beyond the jury's verdict], but the maximum he may impose *without* any additional findings"). On such a reading, the case would establish a rule that the type of sentencing fact that must be submitted to a jury is not merely one that increases the otherwise-applicable *statutory* maximum (as *Apprendi* held), but "any fact that increases the upper bound on a judge's sentencing discretion." *Id.* at 2546 (O'Connor, J., dissenting). That is how the opinion was interpreted by the court of appeals majority in *Booker*. See 04-104 Pet. App. 10a ("*Blakely* redefined 'statutory maximum'"). But the Court in *Blakely* explicitly stated that it was "apply[ing] the rule" of *Apprendi*, 124 S. Ct. at 2536, and that rule governs facts that increase the penalty "beyond the prescribed statutory maximum." *Ibid.* *Blakely* (like *Apprendi*) involved a fact that increased what the Court itself accurately described as a "statutory maximum," *id.* at 2537, *i.e.*, a maximum set by statute. Because *Blakely*, like *Apprendi*, involved multiple statutory maximum sentences and so necessarily required a search for "the relevant 'statutory maximum,'" *ibid.*, any language in *Blakely* that suggests a broader rule was not necessary to the outcome. As Judge Easterbrook observed, in responding to the claim that "it does not matter" under *Blakely* "whether the maximum is statutory," *Blakely* "does not hold that," and indeed "*could not* 'hold' that," given that "it dealt with statutes exclusively." 04-104 Pet. App. 20a (dissenting opinion).

B. A Fact That Increases A Defendant's Offense Level Under The Sentencing Guidelines Does Not Increase The Statutory Maximum Sentence

Apprendi applied in *Blakely* because the Washington Sentencing Reform Act was found to establish "statutory maximum" sentences. *Apprendi* does not apply here, because the Federal Sentencing Guidelines do not establish statutory maximum sentences.

1. The functions performed by the Sentencing Commission are those that have historically been performed by sentencing judges

a. The most basic reason that the Sentencing Commission does not set statutory maximum sentences is that Congress itself establishes such maximum terms, and the Commission is not a legislature but "an independent commission in the judicial branch," 28 U.S.C. 991(a), which formulates the Guidelines in order to channel judicial discretion in sentencing. *Mistretta*, 488 U.S. at 395. Indeed, one of the central reasons that this Court rejected a separation-of-powers challenge to the Guidelines in *Mistretta* is that the Commission does "not bind or regulate the primary conduct of the public," *id.* at 396, is not engaged in "the legislative business of determining what conduct should be criminalized," *id.* at 407, and does not exercise "the legislative responsibility for establishing minimum and maximum penalties for every crime," *id.* at 396. Rather than being legislative, *Mistretta* explained, "the Commission's functions * * * are clearly attendant to a central element of the historically acknowledged mission of the Judicial Branch." *Id.* at 391. In particular, the questions assigned to the Commission are "precisely the questions" that were decided by "the Judicial Branch, as an aggregate," before the enactment of the Sentencing Reform Act of 1984: "what sentence" within the statutory range "is appropriate to what criminal conduct under what circumstances." *Id.* at 395. The "every-

day business of judges, taken collectively," was "to evaluate and weigh the various aims of sentencing and to apply those aims to * * * individual cases." *Ibid.* *Mistretta* held that the Commission "does no more than this, albeit basically through the methodology of sentencing guidelines, rather than entirely individualized sentencing determinations." *Ibid.*[8]

Mistretta thus confirms that the Sentencing Commission, which considers and then regularizes the same factors that courts had always considered in imposing sentence, exercises functions that have historically been carried out by sentencing judges, not by Congress. No one would suggest that facts found by a sentencing judge before the advent of the Guidelines were subject to the requirements of the Sixth Amendment. *Apprendi* explicitly stated that its holding does not prevent judges from "taking into consideration various factors relating both to offense and offender" in "imposing a [sentence] within the range prescribed by statute," 530 U.S. at 481 (emphasis omitted), and it explicitly distinguished a "factor" of this type from a fact that results in "an increase beyond the maximum authorized statutory sentence," such that the fact is "the functional equivalent of an element of a greater offense," *id.* at 494 n.19. *Blakely*, too, acknowledged that *Apprendi* does not prohibit "judicial fact-finding" when the judge is "rul[ing] on those facts he deems important to the exercise of his sentencing discretion." 124

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[8] This view is consistent with the fact that, in formulating the Guidelines, the Commission canvassed prior sentencing practices and attempted to identify all the factors that judges traditionally used in determining an appropriate sentence. See United States Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 16-17 (1987). See also 28 U.S.C. 994(m) (requiring Commission to "ascertain the average sentences * * * prior to the creation of the Commission"). In formulating such pre-Guidelines sentences, judges had considered a "wide variety of factors in addition to evidence bearing on guilt." *Nichols* v. *United States*, 511 U.S. 738, 747 (1994).

S. Ct. at 2540. Since the Sentencing Commission does "no more" than what sentencing judges did under the old regime, *Mistretta*, 488 U.S. at 395, "the Commission's act of establishing sentencing ranges in the Guidelines is categorically different from the legislative act of setting a maximum penalty in a substantive criminal statute," *United States* v. *Kinter*, 235 F.3d 192, 201 (4th Cir. 2000), cert. denied, 532 U.S. 937 (2001). And since "*Blakely* itself * * * tells us that legislatures *may* delegate such issues to the judiciary * * * without offending the [S]ixth [A]mendment," 04-104 Pet. App. 21a (Easterbrook, J., dissenting), *Blakely* should not prevent Congress from delegating the issues to a commission that has taken on an "historically acknowledged mission of the Judicial Branch," *Mistretta*, 488 U.S. at 391.

A conclusion that the Sixth Amendment does not apply to a delegation of authority to sentencing *judges*, but does apply to a delegation to a sentencing *commission*, would be particularly anomalous in light of the underlying purpose for authorizing a commission in the judicial branch to promulgate sentencing guidelines. The delegation of discretion to individual judges to find facts relevant to sentencing resulted in widely disparate and potentially arbitrary sentences for similarly situated defendants. The delegation to the Sentencing Commission grants no additional factfinding power to sentencing judges, as opposed to juries, but seeks only to channel judicial discretion in order to eliminate unwarranted disparities. As Judge (then Professor) Lynch has observed,

> [i]f it was acceptable for a judge * * * to decide that the defendant before him was a Mafia member who committed the assault on orders of a crime boss, rather than, as he contended, just an acquaintance of the victim who acted out of anger, and to allow that fact to influence the degree of punishment or 'correction' required for the defendant, it is difficult * * * to see why the fact must be proved beyond a reasonable doubt to a jury once an institutional mechanism is in place to insist that the few judges who would not have regarded this fact as relevant on their own take it into account nevertheless.

Gerard E. Lynch, *Towards A Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 Buff. Crim. L. Rev. 297, 321 (1998). Accord *United States* v. *Koch*, No. 02-6278, 2004 WL 1899930, at *5 (6th Cir. Aug. 26, 2004) (en banc) ("If federal judges * * * may consider facts that increase sentences in an indeterminate sentencing regime, is it not permissible for this branch of government collectively to channel the consequences of these facts based on their group experience?").

In *Blakely*, the Court said that the Sixth Amendment does not apply to facts that a judge "deems important to the exercise of his sentencing discretion" under a system of discretionary sentencing because such facts "do not pertain to whether the defendant has a legal *right* to a lesser sentence." 124 S. Ct. at 2540. But the Commission's systematizing of the general manner in which courts exercise their sentencing discretion should not produce a radical change in the way in which the facts bearing on the exercise of sentencing discretion must be found. Even under a system of discretionary sentencing, a legislature could have required all judges in a district to participate in "sentencing councils" in an effort to regularize their practices.[9] The legislature could have further authorized appellate review to ensure that judges exercised discretion in light of the work of the councils, and that unjustified departures from a council's

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[9] In fact, before the Guidelines, Congress authorized judicial institutes and councils "to formulate standards and criteria for sentencing." *Mistretta*, 488 U.S. at 365 (citing 28 U.S.C. 334). The councils, which could not establish enforceable norms, were not viewed as a sufficient means to relieve sentencing disparities. See Symposium, *Appellate Review of Sentences*, 32 F.R.D. 249, 270 (1962).

suggested sentences, within the wide ranges afforded by statute, constituted an abuse of discretion. Over time, through a common-law process, reviewing courts could have developed a body of precedent that gave rise to legal norms on how long a sentence should be for particular conduct. Cf. 04-104 Pet. App. 21a (Easterbrook, J., dissenting) (noting that a district court could have set forth in written opinions, "as a matter of common law," the factors on which it would rely in imposing sentence within the statutory range in different types of cases, *e.g.*, "10 years unless the burglar uses a gun; if a gun, then 40 years"). Such a system could be understood as conferring a "legal right" on a defendant to be sentenced in accordance with the appellate "guidelines." But it could not be maintained that the judiciary's own creation of systematic standards for considering sentencing factors constituted the creation of new elements of offenses. There is no greater reason to apply the Sixth Amendment to the present system, under which accumulated judicial wisdom about the facts that matter at sentencing is collectively reflected in rules promulgated by a commission in the judicial branch.

b. There are respects in which Congress's delegation of authority to the Sentencing Commission differs from its delegation to sentencing judges in the pre-Guidelines era. For one thing, Guidelines promulgated by the Commission must be submitted to Congress and do not take effect for a period of 180 days, during which time Congress may "modif[y] or disapprove[]" the proposed guidelines. 28 U.S.C. 994(p). Even after Guidelines have taken effect, Congress can "revoke or amend" them "at any time." *Mistretta*, 488 U.S. at 393-394. And Congress has in fact exercised that authority. It has rejected proposed guidelines;[10] it has directed the Commission to review and, if appropriate,

[10] See Act of Oct. 30, 1995, Pub. L. No. 104-38, § 1, 109 Stat. 334.

amend Guidelines;[11] and it has even enacted Guidelines amendments itself.[12]

The delegation to the Sentencing Commission also differs from a delegation to judges in that the Sentencing Reform Act provides that, except in the unusual case in which a departure is justified, a district court "shall impose a sentence of the kind, and within the range," set by the Guidelines. 18 U.S.C. 3553(b). As this Court has observed, Congress has thereby made the Guidelines "binding on federal courts." *Stinson* v. *United States*, 508 U.S. 36, 42 (1993).

Finally, the courts of appeals have widely held that the *Ex Post Facto* Clause applies to changes in the Guidelines. See *United States* v. *Bell*, 991 F.2d 1445, 1447 & n.4 (8th Cir. 1993). Since this Court has made clear that "the *Ex Post Facto* Clause does not apply to judicial decisionmaking," *Rogers* v. *Tennessee*, 532 U.S. 451, 462 (2001) (emphasis added), that Clause would have no force in regulating whether a judge in the pre-Guidelines system could impose a higher sentence on the basis of a fact that he would not have relied upon at the time of the offense. The application of the *Ex Post Facto* Clause to the Guidelines thus suggests that they are "legislative" for that purpose. Cf. *Miller* v. *Florida*, 482 U.S. 423 (1987) (applying *Ex Post Facto* Clause to revised state statutory guidelines).

The differences between Congress's delegation of authority to the Sentencing Commission and its earlier delegation to district courts, however, do not make the Commission more like an agent of the legislature than like a vehicle for distilling the collective practices of sentencing judges as a whole and rationalizing and harmonizing those practices in

[11] See 28 U.S.C. 994 note (Provisions for Review, Promulgation, or Amendment of Federal Sentencing Guidelines).

[12] See PROTECT Act, Pub. L. No. 108-21, § 401(b), (g), and (i), 117 Stat. 668-669, 671-673 (2003).

light of the defined purposes of sentencing. Congress is accountable for the definition of crimes and the maximum penalties for the prohibited conduct, such that the legislature remains responsive to "structural democratic constraints" in fixing the maximum punishment that is proportionate to a crime. *Apprendi*, 530 U.S. at 490-491 n.16. Congress continues to exercise that responsibility by increasing maximum sentences for crimes it deems particularly serious. The jury-trial guarantee is not offended by permitting an independent commission in the Judicial Branch to examine the characteristics that differentiate offenders and to make refinements in where defendants fall on the spectrum of offenders who violate a particular statute. The jury-trial guarantee does not mandate that *all* facts that increase a sentence within a statutory range must be treated as elements. See *Williams* v. *New York*, 337 U.S. 241 (1949). Rather, the guarantee applies only to those facts that increase a sentence above what the *legislature* has found to be warranted by the elements specified in the statute.

2. The Sentencing Guidelines bear no resemblance to a graduated statutory offense with different "degrees" of seriousness

The principle of *Apprendi* is that the Constitution's jury-trial and proof-beyond-a-reasonable-doubt guarantees apply to any fact that is "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." 530 U.S. at 494 n.19. That principle could be said to apply in *Blakely* on the premise that the Washington statutes effectively created statutory offenses whose "degree" depends on the presence or absence of a particular aggravating fact. The Washington scheme imposed multiple statutory maximum sentences and required the courts to identify the "relevant" statutory maximum. The United States Sentencing Guidelines, however, cannot be understood as creating grades of statutory offenses.

a. Under the Washington Sentencing Reform Act considered in *Blakely*, for every crime, there was a particular sentencing range for the simplest form of an offense of conviction combined with the defendant's criminal history (the "standard range"); additional prison time could be added to the standard range based on the presence of one or more of a limited number of designated aggravating facts (such as use of a firearm); and the standard range could be increased further based on the presence of one or more other aggravating facts, which need not be those listed in the statute (an "exceptional sentence"). See Wash. Rev. Code §§ 9.94A.125, .310, .350, .360, .370, and .390 (2000). For each offense in Washington's Criminal Code, Wash. Rev. Code tit. 9A (2000), therefore, the Washington Sentencing Reform Act set the penalties for the basic offense and aggravated forms of the offense. In *Blakely*, for example, the three forms of the offense were second-degree kidnapping (punishable by 13 to 17 months of imprisonment), second-degree kidnapping involving a firearm (punishable by 49 to 53 months), and second-degree kidnapping involving a firearm and deliberate cruelty (punishable by up to ten years).

The Washington scheme thus resembles federal statutes that set three different maximum penalties for an offense depending on the presence or absence of certain aggravating facts. For example, under 18 U.S.C. 111 (as amended by the Federal Judiciary Protection Act of 2002, Pub. L. No. 107-273, § 11008(b), 116 Stat. 1818), "simple assault" is punishable by a maximum of one year in prison and "all other" assaults are punishable by a maximum of eight years, unless the defendant "use[d] a deadly or dangerous weapon" or "inflict[ed] bodily injury," in which case the maximum sentence is 20 years. And under 21 U.S.C. 841(b)(1), a cocaine offense committed by a defendant with no prior felony drug convictions is punishable by a maximum of 20 years of imprisonment if it involved an unspecified quantity of drugs; a maximum of 40 years if it involved a threshold quantity of

drugs (at least 500 grams of cocaine); and a maximum of life if it involved a higher threshold quantity (at least five kilograms of cocaine). *Apprendi* indisputably applies to 18 U.S.C. 111,[13] to 21 U.S.C. 841(b)(1),[14] and to other federal statutes with three different maximum penalties.[15] Those statutes necessarily require the identification of the "relevant" statutory maximum. Certain facts move a defendant from one statutory offense to another, and those facts must be considered, for *Apprendi* purposes, as elements that alter the statutory maximum sentence. Similar logic can explain the Court's application of *Apprendi* to Washington's Sentencing Reform Act in *Blakely*. See 04-104 Pet. App. 18a (Easterbrook, J., dissenting) (*Blakely* is this Court's "analog" to Seventh Circuit case applying *Apprendi* to 21 U.S.C. 841(b)(1)).

b. Unlike the New Jersey statutes at issue in *Apprendi*, the Arizona statutes at issue in *Ring*, and the Washington statutes at issue in *Blakely*, the Guidelines do not "divide crimes into narrow degrees and standard categories," but instead "provide a methodology for assessing the seriousness of different instances of crime, quite separate from the elements of any particular statutory crime." *United States* v. *Emmenegger*, No. 04 CR. 334 (GEL), 2004 WL 1752599, at *16 (S.D.N.Y. Aug. 4, 2004) (Lynch, J.). There are fundamental differences between that methodology and the manner in which the Washington statutes operate.

[13] See *United States* v. *Campbell*, 259 F.3d 293, 298-299 (4th Cir. 2001); *United States* v. *McCulligan*, 256 F.3d 97, 99-100 (3d Cir. 2001).

[14] See *United States* v. *Longoria*, 298 F.3d 367, 368 (5th Cir.) (en banc) (per curiam) (courts of appeals "have unanimously agreed that drug quantities triggering increased penalties under 21 U.S.C. § 841 are facts that must be submitted to a jury and charged in an indictment under the *Apprendi* rule"), cert. denied, 537 U.S. 1038 (2002).

[15] See, *e.g.*, *United States* v. *Williams*, 343 F.3d 423, 432-434 (5th Cir.) (18 U.S.C. 242 (deprivation of rights under color of law)), cert. denied, 124 S. Ct. 966 (2003); *United States* v. *Friedman*, 300 F.3d 111, 127 (2d Cir. 2002) (18 U.S.C. 1952 (interstate travel in aid of racketeering)), cert. denied, 538 U.S. 981 (2003).

First, the Washington statutes can be seen as defining offenses of three grades: one that carries the standard sentence; one that carries the standard sentence increased by additional time; and one that carries an exceptional sentence. Under the Guidelines, by contrast, multiple factors, defined by the Commission, influence the sentence imposed under a single statutory maximum. Congress has not created alternative possible statutory maximum sentences, and there is thus no need to identify the "relevant" one.

Unlike a traditional statute defining simple and aggravated forms of an offense, the Sentencing Guidelines seek to "reflect every important factor relevant to sentencing for each category of offense and each category of offender." Senate Report 169. Under the principal drug Guideline, for example, there are 19 possible base offense levels, five specific offense characteristics that can increase the offense level, and two cross-references requiring the application of a different Guideline. Guidelines § 2D1.1. And under the principal theft and fraud Guideline, there are 14 separate specific offense characteristics that can increase the defendant's offense level. *Id.* § 2B1.1(b). There are also a dozen upward adjustments that could apply in any case—one of two possible adjustments for victim vulnerability, *id.* § 3A1.1(b); four others relating to the victim, *id.* §§ 3A1.1(a), 3A1.2, 3A1.3; one relating to terrorism, *id.* § 3A1.4; one of three possible adjustments for the defendant's role in the offense, *id.* § 3B1.1; one for abuse of trust or use of a special skill, *id.* § 3B1.3; one for use of a minor, *id.* § 3B1.4; one of two possible adjustments for use of body armor, *id.* § 3B1.5; one for obstruction of justice, *id.* § 3C1.1; and one for reckless endangerment during flight, *id.* § 3C1.2.

In determining whether each of these facts is present in a particular case, the sentencing judge is required to consider not merely the offense of conviction but all "relevant

conduct." Guidelines § 1B1.3(a). That concept includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" that occurred "during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." *Id.* § 1B1.3(a)(1)(A). In cases involving jointly undertaken criminal activity, it also includes "all reasonably foreseeable acts and omissions of others" in furtherance of such activity that occurred in connection with the offense of conviction. *Id.* § 1B1.3(a)(1)(B). And in cases where the offense level is determined largely on the basis of some measure of aggregate harm (including fraud and drug cases), it also includes all acts and omissions that were "part of the same course of conduct or common scheme or plan as the offense of conviction." *Id.* § 1B1.3(a)(2).

The myriad of relevant factors and possible sentences reflects the Guidelines' purpose of channeling discretion, rather than creating elements of distinct crimes. In view of the "complex interactions" among "the dozens of findings that matter to the Guidelines' operation in each case," 04-104 Pet. App. 23a-24a (Easterbrook, J., dissenting), facts that increase a defendant's offense level cannot reasonably be viewed as the functional equivalent of elements of greater offenses. It would be particularly difficult to conceptualize relevant conduct—conduct that, "very roughly speaking, corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment," *United States* v. *Wright*, 873 F.2d 437, 441 (1st Cir. 1989) (Breyer, J.), quoted in *United States* v. *Watts*, 519 U.S. 148, 152 (1997) (per curiam)—as an element of a greater offense, since relevant conduct, by definition, falls outside the boundaries of the conduct constituting the offense. Thus, while it may make sense, when viewing Washington's Sentencing Reform Act through a Sixth Amendment prism, to regard the Act as defining three "degrees" of every offense in its Criminal Code, it is not reasonable to think that, for each offense in the United States Code, there are "a hundred different * * * 'offenses' corresponding to the myriad possible permutations of Guidelines factors." *Pineiro*, 377 F.3d at 473.

Second, under the Washington statutes, the offense of conviction dictates a particular "seriousness level," which in turn (in combination with the defendant's "offender score") dictates a "standard sentence range" that can be viewed as the maximum penalty for the lowest "degree" of the offense at issue. "No 'standard' sentence * * * emerges from the Guidelines in the same way that it does for the [system] * * * that Washington's legislature adopted." *Koch*, 2004 WL 1899930, at *6. Indeed, the Guidelines "defy any effort to identify a 'standard sentenc[e] range'" for a particular offense, *Emmenegger*, 2004 WL 1752599, at *16, because they do not set a penalty for the offense of conviction. Unlike the "seriousness level" of the offense of conviction under the Washington statutes, a defendant's base offense level under the Guidelines does not correspond to any particular sentence, because a Guidelines range cannot be determined until the judge applies specific offense characteristics and adjustments under Chapter Three (which can either increase or decrease the offense level); "groups" the counts (in a multi-count case) and adjusts the offense level accordingly; reduces the offense level (if appropriate) for acceptance of responsibility; calculates the defendant's criminal history category; and then makes any further adjustments under Chapter Four. See Guidelines § 1B1.1(a)-(g).

Not only is there no corresponding Sentencing Guidelines range for the offense of conviction, there is frequently no corresponding base offense level. While the Guideline that is applicable in a given case depends on the offense of conviction, Guidelines §§ 1B1.1(a), 1B1.2(a), the applicable Guideline will often require the sentencing judge to apply one rather than another of multiple base offense levels, *e.g.*,

id. § 2A5.2(a), or direct the judge to a different Guideline entirely, *e.g.*, *id.*, § 2B1.1(c), if a particular fact, taking into account all relevant conduct, see *id.* § 1B1.3(a)(i) and (iii), is found to be present.

Third, under the Guidelines, when the offense level is increased on the basis of a specific offense characteristic or adjustment, the resulting offense level, like the base offense level, does not correspond to any particular sentencing range. Unlike the Washington statutes, the Guidelines do not establish an increased "standard sentence range" for a higher "degree" of the offense at issue, because, before a Guidelines range can be calculated, there may be *reductions* (as well as increases) in the offense level under Chapter Two, Chapter Three, or both. See, *e.g.*, Guidelines § 2D1.1(b)(6) ("safety valve" in drug case); *id.* § 3B1.2 (minor or minimal role); *id.* § 3E1.1 (acceptance of responsibility). The Guidelines are not a system of isolated enhancements that are individually applied to create higher "degrees" of the offense of conviction, but an integrated system of enhancements and reductions that in combination yield a sentencing range for each defendant. Thus, in contrast to statutory maximum terms, which are approved by Congress, clear on the face of a law, and applicable to all defendants sentenced under that provision, Guidelines maximums are litigated case-by-case for each defendant, vary considerably depending on the facts, and are not specifically approved by Congress.

C. This Court Has Consistently Recognized The Distinction Between A Fact That Increases The Statutory Maximum And A Fact That Increases A Defendant's Offense Level Under The Guidelines

In the seven years before *Apprendi* was decided, this Court decided four cases involving sentence-enhancing facts under the Guidelines. While none presented a claim that the Sixth Amendment precludes sentencing judges from finding such facts, in each case "the Court addressed a question not

dissimilar to the one presented here," *Koch*, 2004 WL 1899930, at *3, and in each case it "affirmed sentences that would appear to present the very concerns that some now argue invalidate the Guidelines," *Emmenegger*, 2004 WL 1752599, at *11. It did so, moreover, unanimously in two of the cases; by summary disposition in a third; and "without a murmur of constitutional qualm" in any. *Ibid.* In rejecting challenges to Guidelines sentences, these decisions also did what the decisions below did not: they "embraced and relied" on "the proposition that the United States Code, *and not the Guidelines*, establishes maximum sentences for offenses," *Pineiro*, 377 F.3d at 471, 473, and they treated facts that mandate a higher sentence under the Guidelines as the analytical equivalent of facts that might have led to a higher sentence as a matter of judicial discretion in the pre-Guidelines era. These decisions have thus "articulated a particular vision of the interaction between the Guidelines and the United States Code," *Pineiro*, 377 F.3d at 473, and that vision is fundamentally at odds with the view that *Apprendi* or *Blakely* applies to the Guidelines.

1. In *United States* v. *Dunnigan*, 507 U.S. 87 (1993), the Court unanimously held that, upon a determination by the sentencing judge that the defendant committed perjury at trial, "an enhancement of sentence is required" by Section 3C1.1 of the Guidelines. *Id.* at 98. Rejecting the contention that such a requirement is "in contravention of the privilege of an accused to testify in her own behalf," *ibid.*, the Court found the case indistinguishable from *United States* v. *Grayson*, 438 U.S. 41 (1978), a pre-Guidelines case that "upheld a sentence increase based on an accused's false testimony at trial," *Dunnigan*, 507 U.S. at 91. In following *Grayson*, the Court found it irrelevant that the Guidelines enhancement, unlike the one at issue in that case, "stems from a congressional mandate rather than from a court's discretionary judgment." *Id.* at 98. The Court also rejected the notion that "the enhancement is * * * a mere surrogate for a

perjury prosecution," noting that "[t]he perjuring defendant's willingness to frustrate judicial proceedings to avoid criminal liability suggests the need for incapacitation and retribution is heightened as compared with the defendant charged with the same crime who allows judicial proceedings to progress without resorting to perjury." *Id.* at 97-98.

2. In *Witte* v. *United States*, 515 U.S. 389 (1995), the defendant had engaged in two related drug transactions but was initially prosecuted only for the second. After a guilty plea, the sentencing judge treated both transactions as relevant conduct in calculating the drug quantity for which the defendant was responsible under Section 2D1.1 of the Guidelines, with the result that his offense level was higher than it would have been if the first transaction had been excluded. When the defendant was subsequently prosecuted for the first transaction, the district court dismissed the indictment on double-jeopardy grounds.

This Court held that the dismissal was improper. It found the case to be governed by *Williams* v. *Oklahoma*, 358 U.S. 576 (1959), a pre-Guidelines case holding that "use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime within the authorized statutory limits does not constitute punishment for that conduct within the meaning of the Double Jeopardy Clause." 515 U.S. at 399. Applying that principle, the Court found no double-jeopardy violation, because, while including the drugs from both transactions had increased the Sentencing Guidelines range, the range "still [fell] within the scope of the legislatively authorized penalty," which was 5 to 40 years. *Ibid.* In relying on *Williams*, the Court rejected the suggestion that "the Sentencing Guidelines somehow change the constitutional analysis." *Id.* at 401. Noting that "[t]he relevant conduct provisions are designed to channel the sentencing discretion of the district courts and to make mandatory the consideration of factors that previously would have been optional," the Court concluded that a defendant "has

not been 'punished' any more for double jeopardy purposes when relevant conduct is included in the calculation of his offense level than when a pre-Guidelines court, in its discretion, took similar uncharged conduct into account." *Id.* at 401-402.

A holding that *Apprendi* applies to the Guidelines could not be reconciled with *Witte*. If the Guidelines offense level for a defendant found guilty of drug transaction A can be increased on the basis of drug transaction B only if drug transaction B is charged in the indictment and found by the jury based on proof beyond a reasonable doubt, it would appear that, contrary to *Witte*'s holding, the government could not charge drug transaction B as a stand-alone crime in a subsequent case. That is because drug transaction B would be the functional equivalent of a lesser included offense of the "greater offense" of "drug transaction A plus drug transaction B," and the Double Jeopardy Clause prohibits a prosecution for a lesser included offense following a prosecution for the greater offense. See *Brown* v. *Ohio*, 432 U.S. 161, 168-169 (1977). Nor is it clear that *Witte* could be distinguished on the ground that, while drug transaction B might be an element of a greater offense for purposes of the jury-trial guarantee of the Sixth Amendment, it would not be one for purposes of the Double Jeopardy Clause of the Fifth Amendment, because there is arguably "no principled reason" to say that an offense or element under the former differs from an "offence" or element under the latter. *Sattazahn* v. *Pennsylvania*, 537 U.S. at 111 (opinion of Scalia, J.).

3. In *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), the Court summarily reversed two decisions of the Ninth Circuit on the ground that they conflicted both with the Sentencing Guidelines and with this Court's double-jeopardy holding in *Witte*. The Court held that a sentencing judge may treat "conduct of which a defendant has been acquitted" as relevant conduct in calculating the Guidelines offense level in a case where the jury returned a partial

acquittal, *id.* at 154, "so long as that conduct has been proved by a preponderance of the evidence," *id.* at 157. Citing several of its decisions, including *Williams* v. *New York*, *supra*, see 519 U.S. at 151-152, the Court observed that it was "well established" under "the pre-Guidelines sentencing regime" that "a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted." *Id.* at 151-152 (quoting *United States* v. *Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982) (Scalia, J.)). The Court explained that the Guidelines "did not alter this aspect of the sentencing court's discretion," because "relevant conduct" under the Guidelines roughly corresponds to "those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment." *Ibid.* (quoting *Witte*, 515 U.S. at 402, in turn quoting *Wright*, 873 F.2d at 441). Applying *Apprendi* to the Guidelines could not be reconciled with *Watts* any more than with *Witte*, because a rule that only facts found by a jury can be used to increase a defendant's offense level is directly contrary to *Watts*' holding that an offense level may be increased on the basis of facts that the jury affirmatively *declined* to find.

4. In *Edwards* v. *United States*, 523 U.S. 511 (1998), the defendants were charged with conspiracy to possess, with the intent to distribute, cocaine and cocaine base. The jury returned a general verdict of guilty, after being instructed that it could reach that verdict if it found that *either* drug was the object of the conspiracy. In calculating the defendants' base offense levels, the sentencing judge included both cocaine and cocaine base, with the result that the Guidelines sentences were higher than they would have been if only cocaine had been included. Relying on the drug-conspiracy statute (21 U.S.C. 846), the Due Process Clause, and the Sixth Amendment's jury-trial guarantee, 96-8732 Pet. Br. 11-46, the defendants argued that, because there was no special verdict on the type of drug, the judge should have

treated the verdict as a finding that the object of the conspiracy was cocaine, which is punished more leniently than cocaine base.

In a unanimous opinion, this Court disagreed. Even if the defendants were correct, the Court explained, "it would make no difference to their case," because "the Guidelines instruct a sentencing judge to base a drug-conspiracy offender's sentence on the offender's 'relevant conduct,'" *Edwards*, 523 U.S. at 514, and the judge correctly found that the relevant conduct in that case included both cocaine and cocaine base. The Court went on to say that "[o]f course" the defendants' "statutory and constitutional claims" *would* make a difference if "the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy," because "a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines." 523 U.S. at 515 (citing Guidelines § 5G1.1). The defendants' claims did not make a difference in that case because "the sentences imposed were within the statutory limits applicable to a cocaine-only conspiracy." *Ibid.* (citing 21 U.S.C. 841(b)(1)-(3)). *Edwards* thus places dispositive weight on the distinction between a statutory maximum sentence and a Guidelines offense level, and while the opinion did not address whether a jury must find a fact that increases the statutory maximum, it squarely held that the sentencing judge may find facts that increase the Guidelines sentence.

What the Court said in *Edwards* it said again two years later in *Apprendi*. In a footnote near the end of its opinion, immediately after stating that the Sentencing Guidelines were not before the Court and that it was therefore expressing no view on them "beyond what this Court has already held," the Court quoted *Edwards*' statement that the result in that case would have been different if "the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy," because "a maximum sentence set by statute trumps a higher sentence set forth in

the Guidelines." *Apprendi*, 530 U.S. at 497 n.21 (quoting 523 U.S. at 515). Recognizing "the links connecting the [S]ixth [A]mendment, *Apprendi*, *Edwards*, statutory maximums, and the * * * Sentencing Guidelines," 04-104 Pet. App. 17a (Easterbrook, J., dissenting), lower courts have "read *Apprendi* as intending to leave undisturbed the rule, described in *Edwards*, that the sentencing judge may properly find facts that move the Guidelines range within the statutory maximum," *Pineiro*, 377 F.3d at 472. This Court could not hold that *Apprendi* applies to the Guidelines without disavowing *Edwards*, as well as *Watts*, *Witte*, and *Dunnigan*, and saying that the Court has "recently discovered a constitutional principle rendering unconstitutional all the sentencing practices affirmed in those decisions." *Emmenegger*, 2004 WL 1752599, at *11. Particularly because the Guidelines fundamentally differ from the Washington statutes to which *Apprendi* was held to apply in *Blakely*, there is no reason for the Court to take the extraordinary step of abandoning four precedents that were decided within the last dozen years.

Indeed, a holding that *Apprendi* applies to the Guidelines would undermine one of the central premises of *Mistretta* itself. If every fact that enhances the offense level under the Guidelines truly creates a "greater offense," then, contrary to *Mistretta*'s rationale for upholding the Guidelines against a separation-of-powers challenge, it would appear that the Sentencing Commission *does* "bind [and] regulate the primary conduct of the public," 488 U.S. at 396; that it *is* engaged in the "business of determining what conduct should be criminalized," *id.* at 407; and that it *does* establish "maximum penalties for every crime," *id.* at 396. See also pp. 63-66, *infra*.[16]

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[16] A decision applying *Blakely* to the Guidelines would also appear to invalidate, on its facts, the result in *Harris* v. *United States*, 536 U.S. 545 (2002), which upheld an increase in a defendant's mandatory minimum sentence from five to seven years based on a judge's finding that the defendant brandished a firearm under 18 U.S.C. 924(c)(1)(A)(ii). As Justice Thomas pointed out in dissent in *Harris*, 536 U.S. at 578 & n.4, the maximum *Guidelines* sentence for a violation of Section 924(c) is the "minimum term required by the relevant statute. . . . A sentence above the minimum term . . . is an upward departure." *Id.* at 578 n.4 (quoting Guidelines § 2K2.4, comment. (n.1) (Nov. 2001)). Given that Guideline, a finding of brandishing by the court increased the permissible maximum Guidelines sentence (absent a departure, which would itself have required additional facts) from five years to seven years of imprisonment.

D. If *Blakely* Would Require That A Guidelines Range Be Treated As A Statutory Maximum, That Aspect Of *Blakely* Should Be Reconsidered

If *Blakely* "redefined 'statutory maximum,'" 04-104 Pet. App. 10a, to omit the word "statutory," such that "an element of a greater offense," *Apprendi*, 530 U.S. at 494 n.19, now means "any fact that increases the upper bound on a judge's sentencing discretion," *Blakely*, 124 S. Ct. at 2546 (O'Connor, J., dissenting), then it would be hard to argue that *Blakely* does not apply to the Guidelines. If the constitutionally relevant maximum sentence is not the maximum set by Congress, but is instead "the maximum sentence a judge may [legally] impose * * * *without* any additional findings" beyond "the facts reflected in the jury verdict or admitted by the defendant," *id.* at 2537 (emphasis omitted), then the Guidelines set maximum sentences. If that is what the Court held in *Blakely*, however, that aspect of its holding is erroneous, and should be reconsidered and rejected.

1. The opinion in *Blakely* offers no direct historical support for broadening the definition of an "element" from a fact that increases the statutory degree of an offense to a fact that raises the upper limit on the sentencing judge's discretion below the maximum set by Congress. The opinion says, for example, that the Court "compiled the relevant authorities in *Apprendi*," 124 S. Ct. at 2536, but that case applied the narrower definition of "element" and adduced no histori-

cal authorities that considered efforts to structure discretion of a sentencing court within the defined minimum and maximum terms, as the Sentencing Guidelines do.

Nor does the majority opinion adequately explain how a broader definition of "element" can be reconciled with the undisputed principle that the jury-trial guarantee does *not* apply to facts that trial judges have historically relied upon to increase a sentence within the statutorily authorized range. The opinion does say that such facts are not subject to the Sixth Amendment because they "do not pertain to whether the defendant has a legal *right* to a lesser sentence." 124 S. Ct. at 2540. But it is not intuitively obvious why that should matter to a defendant whose sentence within a statutory range is *in fact* increased by factual findings by a judge exercising unfettered discretion. While there may be justification for treating distinct conduct that must be shown in order to trigger a distinct and higher statutory maximum as equivalent to a statutory element, it is not the case that every fact that limits the discretion of a sentencing judge satisfies the ordinary definition of "element"—*i.e.*, a "factual component[]," *Monge* v. *California*, 524 U.S. 721, 737 (1998) (Scalia, J., dissenting), or "ingredient[]," *Apprendi*, 530 U.S. at 500 (Thomas, J., concurring), of a criminal offense. Cf. *Harris* v. *United States*, 536 U.S. 545 (2002) (facts that limit judicial discretion by requiring an increased mandatory minimum within the statutory range are not subject to *Apprendi*). And since structured discretionary sentencing did not exist at the time the Bill of Rights was adopted, there is no historical evidence on the question whether a fact of this type should be considered an "element" for purposes of the Sixth Amendment.

The notion that any fact that raises the upper bound on a sentencing judge's discretion within a statutorily designated range is an "element," therefore, is, in the end, little more than an unsupported assumption. Without a clear textual command in the Constitution or compelling historical evi-

dence, both of which are decidedly absent here, there is no warrant for the Court to override a legislative determination that a judge, rather than a jury, may find the facts that limit the judge's discretion to impose a sentence within the statutorily authorized range. Cf. *Harris* v. *United States*, 536 U.S. at 560 (plurality opinion) (conclusion that fact requiring imposition of statutory minimum sentence is not element of offense "might be questioned" if there were "extensive [contrary] historical evidence," but "[t]he evidence on this score * * * is lacking," because mandatory minimums are "for the most part the product of the 20th century").

2. While *stare decisis* is the "preferred course," *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991), this Court has "often noted" that it is not an "inexorable command," *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997) (quoting *Payne*, 501 U.S. at 828)), and if *Blakely*'s reasoning went beyond its facts, that aspect of the decision should be reconsidered. *Blakely* involved a question of constitutional law, and *stare decisis* is "at its weakest" when the Court is interpreting the Constitution, *Agostini*, 521 U.S. at 235, particularly where, as here, the precedent is "both recent and in apparent tension with other decisions," *Harmelin* v. *Michigan*, 501 U.S. 957, 965 (1991) (opinion of Scalia, J.). Indeed, if *Blakely* went beyond *Apprendi* and requires invalidation of the Guidelines, it is not merely in "apparent tension," *ibid.*, but is inconsistent with decisions treating sentence-enhancing facts under the Guidelines as the equivalent of facts that sentencing judges relied upon before the Guidelines were enacted. See Point I.C, *supra*. The Court would thus have to choose between *Blakely*, on the one hand, and *Dunnigan*, *Witte*, *Watts*, and *Edwards*, on the other. The Court in *Blakely* did not repudiate those well-reasoned precedents and offered no reason for doing so. If *Blakely* is limited to cases that involve multiple statutory maximum sentences and judge-found facts that move a defendant from one to the other, then those precedents stand. If a choice is necessary, however, it is an

unnecessary line of reasoning in a single case decided last Term, not the line of cases decided over the last dozen years, that should give way.

3. The proper Sixth Amendment test is more receptive to constitutional judgment about the nature of the particular sentencing system. *Apprendi*'s bright-line test guards against direct legislative erosion of the procedural safeguards that must accompany the proof of "elements," in cases where a legislature has created tiers of maximum sentences distinguished by particular aggravating facts. Systems like the Federal Sentencing Guidelines, however, do not pose the threat of direct legislative usurpation and should not be judged by such a bright-line rule, but instead should be evaluated by considering the overall nature of the system in question and the purposes, history, context, and effects of the particular statute.

Under that approach, the Guidelines are a constitutional means of channeling judicial discretion. The Guidelines responded to a critical problem of unfairness in purely discretionary sentencing. The Sentencing Reform Act emerged from years of careful study about the problems with the discretionary-sentencing regimes that prevailed in the United States for the majority of the twentieth century. One of the most serious criticisms of wholly discretionary sentencing was that it resulted in significant disparities in the sentences imposed on similarly situated defendants, including disparities based on race, ethnicity, and gender. See pp. 3-4, *supra*.

Discretionary sentencing (often coupled with parole) represented a valuable reform compared to statutes that do not allow for individualization of punishment, despite major differences in the way in which defendants commit their crimes. The nation's experience showed that, in sentencing, "justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the

offense together with the character and propensities of the offender." *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U.S. 51, 55 (1937). The Sentencing Guidelines accomplish that aim, by channeling a court's consideration of a wide variety of factors that traditionally influenced a sentencing court's discretion. The Guidelines thus offer a mechanism for minimizing the disparities and discrimination inherent in fully discretionary sentencing, while providing the proportionality lacking in determinate sentencing with only one or a few sentences available for every defendant convicted of a particular offense. Protection of the constitutional values underlying *Apprendi* does not require the Court to invalidate that federal system of sentencing reform, which serves vital interests of fairness and equality in criminal justice and which the Court has repeatedly sustained against a variety of constitutional challenges.

II. IF *BLAKELY* IS HELD TO APPLY TO THE GUIDELINES, THE GUIDELINES CANNOT BE APPLIED AS BINDING SENTENCING RULES IN CASES WHERE JURY FACTFINDING WOULD BE REQUIRED

If the Court concludes that the principles of *Blakely* preclude judges from finding a fact (other than a prior conviction), absent the defendant's consent, when that fact increases the maximum Guidelines sentence, then the current system of sentencing under the Guidelines—with judges determining the facts that both increase and decrease the Guidelines sentence—cannot be applied. In that event, the lower courts will be in desperate need of guidance and this Court must determine what sentencing process should govern in federal criminal cases. In light of the integrated sentencing system it envisioned, Congress would not have intended the Guidelines to be applied as though they created "elements" of an array of offenses, to be administered in part by juries and in part by judges, operating under different

standards of proof. Congress addressed perceived problems with disparities in *judicial* sentencing and sought to channel *judges'* discretion; it did not intend to vest juries with unprecedented authority in the sentencing process. Congress likewise clearly sought to refocus the sentencing process; it did not intend for the Commission effectively to rewrite the federal criminal code by adding multiple new elements to existing crimes.

The Sentencing Commission, as well, would not have intended that a truncated and one-sided version of the current Sentencing Guidelines, which would result from overlaying *Blakely* methods of charging and proof, should govern federal sentencing. The procedural questions that would have to be resolved to operate such a system are daunting, and there is no source of legislative guidance to answer them. Equally important, treating the Sentencing Commission's work product as "elements" raises difficult constitutional questions about the role of the Commission in defining crimes.

For those reasons, in any case in which the Constitution prohibits the judicial factfinding procedures that Congress and the Commission contemplated for implementing the Guidelines, the Guidelines as a whole become inapplicable. In such cases, a judge would have to impose sentence within the statutory maximum and minimum terms, treating the Guidelines as advisory. That approach would leave Congress free to reconstruct a sentencing system to achieve its goals in a manner consistent with constitutional requirements.

A. Severability Analysis Turns On The Intent Of The Legislature And The Commission, And On Whether The Severed Provisions Are Operable As A Law

1. "The inquiry into whether a statute is severable is essentially an inquiry into legislative intent." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999). The governing principle is that "[u]nless it is evident

that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines* v. *Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (per curiam)).

The inquiry into legislative intent does not turn solely on whether a severed statute can be said to achieve Congress's *purposes* in enacting the law. Because "severance is based on the assumption that Congress would have intended the result," *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 72 (2001), the "relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress" after the unconstitutional provision has been severed, *Alaska Airlines*, 480 U.S. at 685. See, *e.g.*, *Mille Lacs Band*, 526 U.S. at 191 (declining to sever invalid portion of Executive Order because order "embodied a single coherent policy"). Thus, Congress's means of achieving particular goals, as well as its ultimate ends, must be considered.

In addition, what is left after the offending provision is severed must be "fully operative as a law." *Alaska Airlines*, 480 U.S. at 684. Even when a statute contains a severability clause, a court "cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." *Railroad Ret. Bd.* v. *Alton R.R.*, 295 U.S. 330, 362 (1935). If a statute cannot be made operative without judicial rewriting, severance is impossible, because "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently." *Alaska Airlines*, 480 U.S. at 684.

2. Application of *Blakely* to the Guidelines would invalidate not only certain provisions of a statute (the Sentencing Reform Act), but also certain provisions of a regulatory scheme (the Sentencing Guidelines) promulgated by the United States Sentencing Commission. Accordingly, the

severability analysis must take into account the intent of the Sentencing Commission as well as Congress's. That is so for two reasons.

First, although the Sentencing Reform Act itself imposed certain requirements on the content and structure of what became the Sentencing Guidelines, Congress also clearly intended that the guidelines produced by the Sentencing Commission—not some substantially different set of rules—should govern criminal sentencing. For that reason, if the Court concludes that the Sentencing Commission would not have promulgated the system it did had it known of the impermissibility of judicial factfinding—that is, if the Commission would not have produced the current Guidelines with an overlay of jury factfinding—then creating such a system through severability analysis would thwart Congress's intent that sentencing be in accordance with a system of the Commission's design.

Second, settled principles governing administrative severability support the conclusion that the intent of the Sentencing Commission, as well as that of Congress, is important. In *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281 (1988), this Court held that a portion of a regulation promulgated by the Secretary of the Treasury was inconsistent with the governing statute. The Court then reached the severability question, concluding that "[t]he design of the regulation is such that the [invalidated subsection] is severable." *Id.* at 294. The Court explained that severability turns not merely on whether the statute could operate without the severed provision ("[t]he severance and invalidation of this subsection will not impair the function of the statute as a whole," *ibid.*), but also on whether the Secretary would have promulgated the regulation without the severed provision ("there is no indication that the regulation would not have been passed but for its inclusion," *ibid.*). Earlier cases also declined to sever individual portions of a regulatory scheme where the effect would be to substitute the Court's judg-

ment on matters of policy for the agency's. See *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). As the Court explained in *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618-619 (1944), "[i]t would be the sheerest guesswork to believe that elimination of an important factor in the Administrator's equation would have left his equation unaffected even if he did not here insist upon its importance."

B. Congress Would Not Have Intended The Guidelines System To Be Administered With A Requirement Of Jury Findings For Sentence-Enhancing Facts

1. The Sentencing Reform Act makes clear that the Guidelines should be applied at sentencing by the court, not the jury. Congress was responding to a perceived problem with *judicial* sentencing. The Sentencing Commission was authorized to "promulgate and distribute to all courts of the United States * * * guidelines, as described in this section, *for use of a sentencing court* in determining the sentence to be imposed in a criminal case." 28 U.S.C. 994(a)(1) (emphasis added). Congress further instructed the Commission to consider, in formulating the Guidelines, the extent to which various factors were relevant to "an appropriate sentence" and to "take them into account," insofar as they are relevant, including: "the circumstances under which the offense was committed which mitigate *or aggravate* the seriousness of the offense," "the nature and degree of the harm caused by the offense," and the defendant's "role in the offense." 28 U.S.C. 994(c)(2) and (3) (emphasis added), 994(d)(9). Congress necessarily anticipated that, to the extent that the Commission found such facts relevant, the "sentencing court" (28 U.S.C. 994(a)(1))—not the jury—would make the factual findings on the issues that determine a sentence under the Guidelines.

The provisions governing appeal similarly establish that Congress deliberately provided for guidelines that would be

applied based on factfinding by the sentencing court, not a jury. Congress provided that courts of appeals "shall give due regard to the *opportunity of the district court* to judge the credibility of the witnesses, and shall accept *the findings of fact of the district court* unless they are clearly erroneous and * * * shall give due deference to the *district court's application of the guidelines to the facts.*" 18 U.S.C. 3742(e)(4) (emphasis added).[17] Those standards are plainly directed to the review of determinations by sentencing courts; the statute makes no provision for review of jury verdicts. Indeed, Congress provided for equal rights of appeal for the government and the defendant, 18 U.S.C. 3742(a) and (b), even though government appeals of adverse jury findings at a criminal trial are ordinarily precluded by the Double Jeopardy Clause. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977).

The legislative history also leaves no doubt that Congress intended judges to find the facts that underlay the application of the Guidelines. Congress was responding to perceived problems with the sentences imposed by judges, not juries, and so the Senate Report made clear that the projected guidelines "are designed to structure *judicial* sentencing discretion." Senate Report 65 (emphasis added). See also *id.* at 52 ("the bill requires *the judge*, before imposing sentence, to consider the history and characteristics of the offender, the nature and circumstances of the offense, and the purposes of sentencing") (emphasis added); *id.* at 75 ("*the judge* must consider such things as the amount of harm done by the offense, whether a weapon was carried or used, whether the defendant was a lone participant in the offense or participated with others in a major or minor way,

[17] The "due regard" and "clear error" clauses were part of the original Sentencing Reform Act. *Koon* v. *United States*, 518 U.S. 81, 97 (1996). The "due deference" clause was added in 1988. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, Subtit. C, § 7103(a)(7), 102 Stat. 4417.

and whether there were any particular aggravating or mitigating circumstances surrounding the offense") (emphasis added). The Report nowhere discusses the manifold procedural complications that would have arisen if juries were to decide sentencing issues that had traditionally been resolved by judges.

The Sentencing Commission heeded Congress's directive and designed the Guidelines for application by judges at sentencing, not by juries at trial. The Guidelines Manual "directs the court, once it has determined the applicable [offense conduct] guideline * * * to determine any applicable specific offense characteristics * * * and any other applicable sentencing factor." Guidelines § 1B1.2, comment. (n.2). See also *id.* § 1B1.2(b) (provision clearly directed to courts (not juries) to "[d]etermine" facts relevant to application of the Guidelines). The Guidelines also indicate that the court shall resolve disputed facts based on any reliable evidence, without regard to its admissibility at trial, *id.* § 6A1.3(a), and under a preponderance of the evidence standard, *id.* § 6A1.3, comment. It is thus clear that Congress conceived and the Commission implemented the Guidelines as a means of controlling judicial discretion, not as a means of converting traditional sentencing factors into elements to be found by juries.

2. Severing the requirement of judicial application of the Guidelines for sentence-enhancing facts and substituting a requirement of jury finding of such facts would severely distort the operation of the Guidelines. It would also severely compromise Congress's fundamental goals of eliminating unwarranted disparities among similarly situated defendants and ensuring the proportionality of the sentence to the crime. See 28 U.S.C. 991(b)(1)(B), 994(m); Senate Report 52, 61. And it would defeat the Sentencing Commission's methodology for achieving those same goals and ensuring an appropriate sentence for each defendant.

a. *Severing judicial factfinding on sentence-enhancing facts would be inconsistent with the structure of the Guidelines as a cohesive whole.* The Guidelines system embodies a "single, coherent policy" in which each of the important features—including application by judges, not juries—"performs an integral function." *Mille Lacs Band*, 526 U.S. at 191-192. The provision for judicial factfinding under the Guidelines is "so interwoven" with the other substantive and procedural provisions that it "can not be separated." *Hill* v. *Wallace*, 259 U.S. 44, 70 (1922).

(*i*). Congress intended that the Guidelines should account for both mitigating and aggravating factors in determining each defendant's sentence. 28 U.S.C. 994(c)(2). To that end, the Commission promulgated a detailed and calibrated system of guidelines, taking into account a great many factors to channel a sentencing court's decision-making. The application of any given Guidelines provision (enhancement or reduction) has its intended effect on a sentence only when combined with a conclusion that other Guidelines enhancements and reductions do or do not apply in the individual case. See pp. 29-32, *supra*. Thus, the Commission recognized that, for the Guidelines to work as intended, they must be applied as a cohesive whole. See Guidelines § 1B1.11(b)(2) ("The Guidelines Manual in effect on a particular date shall be applied in its entirety.").

The Sentencing Commission clearly did not set base offense levels or fashion adjustments to those levels to account for an asymmetrical factfinding regime, under which enhancements would be applicable if a jury found them present beyond a reasonable doubt, while reductions would be applicable if the court found them present by a preponderance of the evidence. Altering the system by requiring a different factfinder—and a different standard of proof—for sentence enhancements would fundamentally distort the system.

(*ii*). If the Commission had understood that the government would have the burden of establishing a particular enhancing fact beyond a reasonable doubt, it might have modified the *substance* of the enhancement to account for the increased burden and difficulty of establishing that fact. For example, intent, purpose, or other mental-state requirements to establish various enhancements might have been reduced or modified.[18] Or the Commission might have increased base offense levels for particular guidelines across the board and allowed the defendant, for specified reasons, to seek *mitigation* of the Guidelines range, in a proceeding before a judge in which the defendant bore the burden of proof. Congress might have taken similar action if it had desired to stiffen sentences for certain crimes. Countless provisions of the Guidelines thus might have been crafted differently, in order to account for the asymmetrical difficulty that the government would encounter in meeting its burden of proof, and the increased administrative costs of affording a jury trial.

This Court made a similar point in *Patterson* v. *New York*, 432 U.S. 197 (1977). In that case, the Court noted that "in revising its criminal code, New York provided the affirmative defense of extreme emotional disturbance, a substantially expanded version of the older heat-of-passion concept; but it was willing to do so only if the facts making out the defense were established by the defendant with sufficient certainty." *Id.* at 207. "The State," the Court noted, "was itself unwilling to undertake to establish the absence of those facts beyond a reasonable doubt, perhaps fearing that proof would be too difficult and that too many persons deserving treatment as murderers would escape that punishment." *Ibid.* Under the Sentencing Guidelines, the burdens placed on the government to obtain a particular sentence were

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[18] See Guidelines §§ 2B1.1(b)(5), 2B1.5(b)(4), 2C1.1(c), 2Q1.6(a)(3), 2S1.1(b)(1), 2S1.3(b)(1), 2T1.9(b)(2).

fashioned in light of the understanding that the government would have to meet a preponderance standard, in a showing to a judge unconstrained by formal rules of evidence. See Sentencing Guidelines § 6A1.3 & comment. ("The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."). It is not knowable what alterations the Commission might have made to the Guidelines to account for the risk that a jury-trial right and a burden of proof beyond a reasonable doubt on facts that increase a sentence would result in potentially inadequate sentences.

The existing fraud Guidelines provisions provide an example. A defendant convicted of fraud is subject to a base offense level of 6 or 7, see Guidelines § 2B1.1(a), which translates into a sentencing range of 0-6 months of imprisonment at a low criminal history category. That level corresponds to the smallest-scale frauds, which result in a loss of $5000 or less. The base offense level then is enhanced up to 30 levels for the amount of fraud if that amount is more than $5000. See *id.* § 2B1.1(b)(1). That level can be further enhanced for numerous factors such as the targeting of a particularly vulnerable group of victims, see *id.* § 3A1.1(b), and it can also be reduced for other factors such as acceptance of responsibility, see *id.* § 3E1.1. If enhancing factors had to be found by juries beyond a reasonable doubt, the Sentencing Commission may well have chosen to account for the increased difficulty of proving enhancements by setting the base offense level to accord with the average—not the smallest-scale—offense, or the Commission may have otherwise restructured and reweighed the various enhancing and reducing factors so that the ultimate sentence is proportionate to the crime.

(*iii*). The distorting effects of superimposing a partial system of jury factfinding on the existing Guidelines are

vividly illustrated by any pending cases in which the defendant awaits sentencing and cannot, for double-jeopardy or other reasons, be subject to a new sentencing hearing. Fraud defendants in that situation who are in a low criminal history category—from the small-time scam artist to the multimillion dollar swindler—would all likely be subject to a sentencing range of 0-6 months' imprisonment, despite the substantial differences in their offenses. But neither Congress nor the Sentencing Commission ever contemplated that all fraud defendants would be treated alike or that the most culpable offenders would be treated so leniently. See *United States* v. *Einstman*, No. 04-CR. 97 (CM), 2004 WL 1576622, at *6 (S.D.N.Y. July 14, 2004) ("[I]t seems evident * * * that Congress would never have countenanced a Guidelines system in which all first-time offenders who pled guilty to the elements of wire, mail or bank fraud, and nothing more, were limited to a sentence of 0-6 months * * * without regard to the amount of the fraud, its sophistication, or the role played by the defendant in the conspiracy.").

(*iv*). In the rare instance where an enhanced burden of proof and jury trial right were desired, the Guidelines specifically provide for them. In providing for a hate-crime enhancement, the Guidelines require that "the finder of fact at trial or, in the case of a plea of guilty * * *, the court at sentencing" make a determination on the issue of biased selection of the victim "beyond a reasonable doubt." Guidelines § 3A1.1(a). The provision was promulgated in response to a congressional directive that specified that the facts were to be determined by "the finder of fact at trial" under the increased burden of proof. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. XXVIII, § 280003, 108 Stat. 2096. The substance of the hate-crime provision was thus deliberately framed in light of an intention that the government would bear the burden of proof at a jury trial. The same cannot be said of the vast

majority of Guidelines provisions, whose drafters assumed that normal rules of sentencing procedure applied, *i.e.*, resolution by the judge, under the preponderance standard, without formal evidentiary rules.

b. *Severing judicial factfinding on sentence-enhancing facts would make the resulting system unfeasibly complex.* Typically, juries are called upon to make a limited number of focused factual determinations on the elements of an offense in order to decide whether a defendant is guilty. The sudden addition of numerous Guidelines enhancements to the list of facts that juries must decide could dramatically complicate the task of instructing juries and obtaining valid verdicts. A bank robbery case, for example, could require

> a jury to determine factors regarding the nature of the offense [under Guidelines § 2B3.1] such as (1) the nature of the institution robbed; (2) the presence of, brandishing of, or other use of, a firearm; (3) the making [of] a death threat; (4) the presence of ordinary, serious, or permanent or life threatening bodily injury; (5) any abduction; (6) any physical restraint; (7) the taking of a firearm[;] (8) the taking of drugs; and (9) and the value of property taken[.]

United States v. *Croxford*, 324 F. Supp. 2d 1230, 1254 (D. Utah 2004). Additional adjustments under Chapter 3 of the Guidelines that would have to go to the jury might include the defendant's role in the offense; abuse of a position of trust; use of a special skill; use of a minor; terroristic motivation; or obstruction of justice. *Ibid.*

The inevitable result of requiring a jury to make so many determinations, many of them of great complexity, would be, in some cases, jury confusion and a decrease in the accuracy of jury factfinding. That in turn would lead to a decrease in sentencing uniformity and in proportionality between the seriousness of the crime and the length of sentence imposed. Both the decrease in uniformity and the decrease in proportionality would be directly contrary to Congress's intent that the Guidelines would avoid unwarranted disparities and ensure just punishment. See p. 49, *supra*.

Those consequences would also be contrary to the Sentencing Commission's intent in promulgating its detailed and nuanced set of Guidelines. When the Commission first formulated the Guidelines, it recognized that it was able to craft a relatively complex set of sentencing factors in the Guidelines because judges, rather than juries, were to administer the system:

> In determining guilt or innocence, a jury often is presented with many complex factual issues, but ultimately a relatively small number of factual elements may suffice to support conviction. Sentencing, on the other hand, can require attention to many more discrete factual issues. These receive increased emphasis in a guideline system. A fact-finding process for sentencing decisions that has all the attributes of a formal trial could consume many times the resources devoted to the resolution of guilt or innocence. *Ultimately, such an approach would render the sentencing process completely unworkable.*

United States Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* ch. 6, at 45 (June 18, 1987) (emphasis added). While the Commission endeavored "to focus on a relatively manageable number of frequently-occurring factors and to avoid an effort to attribute specific sentencing weight to every conceivable nuance," *id.* at 46, and believed that "[t]he sentencing factors also tend to be those that are closely tied to elements of the offense (*e.g.*, nature of injury, amount of loss), thus ensuring that evidence relating to them will be adduced in the event of a trial," *id.* at 46 n.78, litigation of factual issues surrounding the Sentencing Guidelines is in fact often a complicated task involving many facts that are not resolved in adjudicating the elements of the offense.

c. *Severing judicial factfinding on sentence-enhancing facts would make some provisions of the Guidelines difficult or impossible to apply.* Many provisions of great importance under the Guidelines could not be implemented if enhancing factors had to be charged in an indictment and submitted to a jury. Sentencing courts have traditionally relied on facts at sentencing that became known only at trial or later, and Congress clearly intended that the courts could continue to use that practice under the Guidelines. Yet that practice would become impossible if enhancing factors had to be charged in an indictment and then proved to a jury. For example, the Guidelines enhancement for obstruction of justice under Section 3C1.1 can be based on a defendant's false testimony at trial. See *Dunnigan*, 507 U.S. at 95-96. Because the government cannot know at the time of indictment whether the defendant will lie on the stand, that enhancement would be impossible to apply. Other enhancing facts may emerge at trial or when a presentence report is prepared; those, too, would have to be omitted from the sentencing calculation, even though they may shed important light on a given offense or offender. And upward departures not specified in the Guidelines would presumably be entirely unavailable. See Guidelines § 5K2.0. Where the Commission had not specified an upward departure ground in advance of the defendant's conduct, it is doubtful that due process would allow specification of that fact at a later time to serve as a basis for increasing a defendant's maximum sentence.

The "relevant conduct" rules would also create a quagmire for judge, jury, and defendant alike. See pp. 29-30, *supra*. As a former Commissioner and General Counsel of the Sentencing Commission have stated, relevant conduct is the "cornerstone" of the Guidelines.[19] Yet relevant conduct can-

[19] William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495 (1990); see also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 8-12 (1990).

not be reconceptualized as an element of an offense. Instructing a jury on these matters would itself present enormous difficulties. See Guidelines § 1B1.3, comment. (eight-page application commentary). But more fundamentally, injecting the relevant-conduct rules into a criminal trial would take the trial far afield of where it belongs—focused, that is, on whether the defendant committed the crime with which he was charged. See *Williams*, 337 U.S. at 246-247 (rules of evidence aim to prevent time-consuming and confusing trial on collateral issues, and to prevent factfinder from "being influenced to convict for [the charged] offense by evidence that the defendant had habitually engaged in other misconduct"). The effect would be to convert virtually every federal crime into a "conspiracy" or "scheme" offense. Much evidence might become admissible that would be extremely prejudicial to a defendant. See *Monge*, 524 U.S. at 729. There is no indication that Congress (or the Commission) intended such a far-reaching transformation of federal criminal trials.

d. *Severing judicial factfinding on sentence-enhancing facts would convert the Guidelines system into a charge-offense system.* As the Commission explained when it first promulgated the Guidelines, "[o]ne of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense with which the defendant was charged and of which he was convicted ('charge offense' sentencing)." Guidelines § 1A1.1 note Pt. A, 4(a). The Commission noted that the pre-Guidelines practice was "a real offense system," because "[t]he sentencing court

(and the parole commission) take account of the conduct in which the defendant actually engaged." *Ibid.* The Commission also explained that a serious drawback of a real-offense system is its complexity, while a serious drawback of a charge-offense system "is its potential to turn over to the prosecutor the power to determine the sentence," by, for example, altering the number of counts charged. *Ibid.*

The Commission in the end adopted a hybrid system that begins its calculation with the charged offense, but which "has a number of real offense elements." Guidelines § 1A1.1 note Pt. A, 4(a). Among those are numerous specific offense characteristics that go beyond the charged conduct. Prominent examples include drug quantity in narcotics cases and loss in fraud cases. *Id.* §§ 2D1.1, 2B1.1. Equally prominent are Chapter Three adjustments for factors such as victim-related aggravators, role in the offense, obstruction of justice, and multi-count adjustments. Guidelines Ch. 3, Pts. A, B, C, and D. Over time, the Commission has added more "real offense" components to the Guidelines.[20]

Replacing the court's traditional role as factfinder at sentencing with a requirement that juries find sentence-enhancing facts would convert the system into a virtually pure charge-offense system, thereby fundamentally altering the balance struck by the Commission. Any sentence-enhancing fact that was constitutionally required to be proved to a jury would first have to be charged in an indictment or (with the defendant's consent) an information. See *United States* v. *Cotton*, 535 U.S. 625, 627 (2002) (stating, after quoting the rule in *Apprendi*, that "[i]n federal prosecutions, such facts must also be charged in the indictment"). A wholesale charge-offense system would render courts incapable of ensuring that similar conduct by defendants received consistent treatment at sentencing, because courts would have no control over what real-offense "elements" were charged. There is no basis for concluding that the Commission would have structured the Guidelines in the same fashion had it realized that its efforts comprehensively to instill real-offense components into the Guidelines were doomed.

[20] See Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 Nw. U. L. Rev. 1342, 1354-1361 (1997).

3. Taking into consideration the integrated structure of the Guidelines as a set of balanced downward and upward adjustments; the complexity that would be foisted on the system in the trial of at least some cases if Guidelines factors were treated as elements; the abridged application of many Guidelines provisions under an indictment and jury-trial regime; and the transformation of the system into virtually a pure charge-offense system, there is ample reason to conclude that Congress and the Commission did not intend for the system to function in such a manner. While a determinate sentencing system is not incompatible with *Blakely*, 124 S. Ct. at 2540, the current Guidelines system was not designed to operate under *Blakely*'s constraints. Overlaying *Blakely*'s requirements on the Guidelines would produce sentences that no policymaker intended or believed appropriate.

C. Administering Jury Factfinding Under The Guidelines Would Require Procedural Innovation Far Greater Than Is Permissible

The Sentencing Reform Act and the Sentencing Guidelines provide no guidance about how to administer the system if defendants have a right to a jury determination of sentence-enhancing factors. Because there is no provision in the applicable statutes, guidelines, or rules that addresses the numerous procedural issues that would have to be resolved, the statute does not "function[] independently" and would not be "fully operative as a law," *Alaska Airlines*, 480

U.S. at 684, without the existing procedures for judicial determination of the facts.

Under the current system, the Guidelines are to be provided "for the use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. 994(a)(1). Generally, a defendant is not sentenced until after the preparation of a presentence report, which develops the facts and calculates the applicable Guidelines range. Fed. R. Crim. P. 32(c) and (d). If the parties have made objections, "[a]t sentencing the court * * * must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute" if it will affect or be considered in sentencing. Fed. R. Crim. P. 32(i)(3)(B). If *Blakely* applies to the Guidelines, those procedures will be unconstitutional for resolution of contested sentencing-enhancing facts, and there is no statutory, guidelines, or rule-based system to put in their place. In theory, courts could fill the resulting gap by instituting a court-designed system of jury findings on sentence-enhancing facts under the beyond-a-reasonable-doubt standard, to be supplemented by judicial findings on facts that reduce the sentence under the preponderance standard. But that system would require a court not merely to sever an unconstitutional provision, but to "amend the act," *Hill* v. *Wallace*, 259 U.S. at 71, a course that the Court has previously declined to undertake.

In *United States* v. *Jackson*, 390 U.S. 570, 576-579 (1968), the Court considered a provision of the Federal Kidnapping Act that authorized a sentence of death only when the jury so recommended. *Id.* at 571-572. The Court held that the provision unconstitutionally burdened the defendant's right to have a trial and to seek a jury. *Id.* at 581-582. The government proposed that the statute could be rescued from constitutional infirmity by reading it to authorize "by implication" the "convening [of a] special jury * * * for the sole purpose of deciding whether [the defendant] should be

put to death" in a case in which the defendant had pleaded guilty or waived jury trial. *Id.* at 576-577.

Noting that there was not "the slightest indication that Congress contemplated any such scheme," the Court rejected the government's proposal. *Jackson*, 390 U.S. at 578. The Court explained that "it would hardly be the province of the courts to fashion [such] a remedy" and that "[a]ny attempt to do so would be fraught with the gravest difficulties." *Id.* at 579. Among the difficult questions that courts would have to resolve would be:

> If a special jury were convened to recommend a sentence, how would the penalty hearing proceed? What would each side be required to show? What standard of proof would govern? To what extent would conventional rules of evidence be abrogated? What privileges would the accused enjoy?

Ibid. The Court explained that "[i]t is one thing to fill a minor gap in a statute," but "quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality." *Id.* at 580.

Replacing the statutory gap in the Guidelines system with a novel system of jury trials for sentence-enhancing facts would be fraught with the same grave difficulties as in *Jackson*. Indeed, it would require judicial legislation on a far greater scale than the approach rejected in *Jackson*, because the Guidelines apply in every federal criminal prosecution. Without any guidance from Congress, courts would have to determine how sentencing factors are to be alleged in an indictment;[21] whether trials would have to be bifurcated into

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[21] Federal Rule of Criminal Procedure 7(c)(1) states that the indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." It does not make any

guilt and sentencing phases;[22] whether the Rules of Evidence would apply at the new proceedings, notwithstanding Congress's intent that they not apply at sentencing;[23] whether a defendant could plead guilty to the underlying offense while reserving a right to a jury on sentence-enhancing facts, and whether, if so, the defendant could still be eligible for acceptance-of-responsibility credit under Guidelines § 3E1.1; whether and what kind of discovery would be permitted on sentence-enhancing facts;[24] whether the government or the defendant would be entitled to lesser-included-offense instructions if a jury could rationally find the defendant guilty of the charged crime, yet reject a sentence-enhancing fact;[25] and whether a jury's inability to

provision for charging Sentencing Guidelines factors, and does not indicate whether they must (or must not) be charged in a particular count.

[22] Current federal law provides for bifurcation only in capital cases. See 18 U.S.C. 3593(b).

[23] See 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); Fed. R. Evid. 1101(d)(3) (Federal Rules of Evidence not applicable in sentencing proceedings).

[24] Federal Rule of Criminal Procedure 16(a)(1)(F)(iii) authorizes discovery when an item is, *inter alia*, "material to preparing the defense or the government intends to use the item in its case-in-chief at trial." In *United States* v. *Armstrong*, 517 U.S. 456, 462 (1996), the Court construed the term "defense" in a predecessor discovery provision (Rule 16(a)(1)(C)) to encompass only material that supports "'shield' claims, which refute the Government's arguments that the defendant committed the crime charged."

[25] Federal Rule of Criminal Procedure 31(c)(1) provides that "[a] defendant may be found guilty of * * * an offense necessarily included in the offense charged." Under *Schmuck* v. *United States*, 489 U.S. 705, 716 & n.8 (1989), a defendant is entitled to a lesser-included-offense instruction if "the elements of the lesser offense are a subset of the elements of the charged offense" and the trial evidence would permit a rational jury "to

agree on a sentence-enhancing fact would require retrial on the entire case, on all sentence-enhancing facts, or just on the single fact on which agreement was not reached. Severing the requirement that judges, not juries, apply the Guidelines would require courts to make the legal and policy decisions necessary to resolve all of those questions. There is no indication that Congress delegated that role to the courts. It is one thing to recharacterize a single factor that increases a statutory maximum and treat it as an element of the crime. It is quite another to take an entire system expressly designed to channel sentencing discretion and treat it as if Congress was attempting to rewrite the criminal code. Accordingly, if *Blakely* invalidates judicial factfinding on sentence-enhancing facts, it cannot be said that the Sentencing Guidelines would continue to "function[] independently." *Alaska Airlines*, 480 U.S. at 684.

D. The Conversion Of The Sentencing Guidelines Into "Elements" Would Raise Serious Constitutional Questions

To treat Guidelines factors as permissibly raising maximum penalties within the meaning of *Apprendi* is to equate those factors, for constitutional purposes, with elements of a criminal offense. *Apprendi*, 530 U.S. at 494 n.19. Severing the Sentencing Reform Act so as to treat Guidelines factors as "elements" would not only ignore Congress's intent to reform judicial sentencing, rather than to rewrite the criminal code, it would also raise serious constitutional problems. It is a "cardinal principle" of this Court's jurisprudence that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf*

find the defendant guilty of the lesser offense, yet acquit him of the greater."

Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

1. A critical premise of this Court's decision upholding the Sentencing Reform Act in *Mistretta* v. *United States*, 488 U.S. 361 (1989), was that "[a]lthough the Guidelines are intended to have substantive effects on public behavior (as do the rules of procedure), they do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime." *Id.* at 396. The Court instead understood that the Guidelines "do no more than fetter the discretion of sentencing judges to do what they have done for generations—impose sentences within the broad limits established by Congress." *Ibid.*

That understanding would be called into question if some enhancing factors set forth in the Guidelines had to "be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476 (quoting *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999)). In that event, those enhancing facts would be "functional[ly] equivalent" to elements of offenses. *Id.* at 494 n.19. Contrary to *Mistretta*'s premise that Guidelines adjustments merely "fetter the discretion of sentencing judges," such Guidelines factors could be seen to "establish[] * * * maximum penalties for every crime," 488 U.S. at 396, and directly affect primary conduct, *Blakely*, 124 S. Ct. at 2540; *Apprendi*, 530 U.S. at 476.

Mistretta upheld the constitutionality of locating the Sentencing Commission in the Judicial Branch, and of authorizing the participation of federal judges, because of the "unique context of sentencing," 488 U.S. at 395, in which there has been a "consistent responsibility of federal judges to pronounce sentence within the statutory range *established by Congress*," *id.* at 391 (emphasis added). In contrast to the longstanding judicial role in sentencing, however, the definition of crimes, and the establishment of statutory maximum terms for offenses, has never been the domain of federal judges. Early on, it was established that federal judges lacked the authority to define common law crimes. *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). Rather, "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." *Ibid.* See *Staples* v. *United States*, 511 U.S. 600, 604 (1994) (definitions of criminal offenses entrusted to the legislature, "particularly in the case of federal crimes, which are solely creatures of statute"). Accordingly, it would be a significant constitutional step beyond *Mistretta* to hold that federal judges may participate in a commission empowered to enact supplementary elements of basic and enhanced offenses that will govern the primary conduct of citizens.

2. There is no indication that Congress intended to take that step. For more than a decade before enacting the Sentencing Reform Act, Congress extensively considered comprehensive criminal-code reform, which would have rationalized the disparate provisions of federal criminal law, but the legislation ultimately failed to pass.[26] Instead, Congress enacted the Sentencing Reform Act in order to establish a *sentencing* system—which would operate within the congressionally defined maximums in the United States Code, see, *e.g.*, 28 U.S.C. 994(b)(1), and which would take into account not just the elements of an offense set by Congress, but the manifold factors that had traditionally informed a judge's sentencing discretion. See, *e.g.*, 28 U.S.C. 994(m) (directing Commission to canvass prior sentencing practice

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[26] Since 1971, the House and Senate Judiciary Committees had been considering legislation to recodify, reclassify, and streamline the patchwork of federal criminal statutes that had proliferated over the years. See Nat'l Comm'n on Reform of Federal Criminal Laws, Final Report (1971). This effort to codify federal criminal law was abandoned in the early 1980s. Robert H. Joost, *Viewing the Sentencing Guidelines as a Product of the Federal Criminal Code Effort*, 7 Fed. Sent. Rep. 118 (1994).

in various categories of cases); 28 U.S.C. 994(r) (requiring Commission to "*recommend* to the Congress that it raise or lower the grade, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate") (emphasis added). Congress did not view the Commission's task as creating a new breed of criminal offenses or altering existing statutory maximums.

3. Particularly in light of that history, the Sentencing Reform Act should not be construed or severed so as to raise constitutional concerns about the role of the Sentencing Commission. Congress's intent in authorizing the promulgation of guidelines was for the Commission to guide the process by which judges have always imposed sentences and thereby produce a more rational, uniform, and proportionate sentencing system. *Mistretta*, 488 U.S. at 395-396. Its intent was not for the Commission to redefine the maximum sentences to be imposed for federal crimes and create separate elements for aggravated versions of such crimes. Nor is it clear that such a task could constitutionally be entrusted to a body in the Judicial Branch. The need to avoid the creation of constitutional doubt provides a strong reason not to overlay a system of jury factfinding on the Guidelines.

E. The Appropriate Remedy Would Be To Hold The Guidelines As A Whole Inapplicable In A Case In Which The Guidelines Would Require The Court To Find A Sentence-Enhancing Fact

1. If the Court accepts the claim that *Blakely* prohibits judicial factfinding that increases the Guidelines sentence, the Guidelines must rise or fall as a whole. For the reasons given above, any unconstitutional requirement of judicial factfinding under the Guidelines cannot properly be severed from the remaining sentencing system created by Congress and the Commission. Accordingly, a holding that *Blakely* applies to the Guidelines would require the conclusion that the system contemplated by Congress and created by the

Commission would be inapplicable in a case in which the Guidelines would require the sentencing court to find a sentence-enhancing fact. The consequence of such a holding would be that the maximum sentence authorized by the jury verdict or guilty plea would be the maximum that Congress established for the offense of conviction. The sentencing court would have discretion to impose a sentence within the statutory minimum and maximum terms.

In such sentencings, the Guidelines would remain as advisory factors for the court to consider. Any constitutional infirmity in judicial factfinding that mandates an increase in a Guidelines sentence would not invalidate 18 U.S.C. 3553(a). That provision defines the purposes of sentencing and requires a judge to impose a sentence "sufficient, but not greater than necessary," to comply with those statutory purposes. 18 U.S.C. 3553(a). Section 3553(a) also requires the court to consider a variety of factors, including "the nature and circumstances of the offense and the history and characteristics of the defendant"; the need for the sentence to achieve retribution, deterrence, incapacitation, and, for non-prison sentences, rehabilitation; and the "kinds of sentence[s] and the sentencing range established" by the Sentencing Commission, as well as the Commission's policy statements. 18 U.S.C. 3553(a)(1), (2), (4), and (5). A sentencing court is also required to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6). And a sentencing court is required to recognize that "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. 3582(a). Neither the advisory use of the Guidelines, nor the other limitations on judicial discretion described above, would run afoul of *Blakely*.

2. It is true that "the major premise of the sentencing guidelines" was "the need to avoid unwarranted sentencing disparity," Senate Report 78; see *id.* at 52, and that Congress

included Section 3553(b), making the Guidelines mandatory, because it concluded that voluntary guidelines had a "poor record" of "reducing sentencing disparities" in the States that had experimented with them, *id.* at 79; see *Mistretta*, 488 U.S. at 367. But a court performing severability analysis cannot simply seek to achieve Congress's ultimate purposes regardless of how much judicial lawmaking is required. Rather, the question is whether the severed statute would "operate in a *manner* consistent with the intent" of Congress. *Alaska Airlines*, 480 U.S. at 685. As discussed above, the "manner" in which the Guidelines would operate if subjected to the requirements of *Blakely* would not be in accordance with the intent of Congress.

Introducing jury factfinding for Guidelines enhancements, moreover, could actually produce unwarranted disparities. Quite apart from the variation in results that could be expected from different juries across the country, a jury verdict in favor of a defendant would be immune from appeal by the government, even if grossly out of line with the facts. *Martin Linen Supply Co.*, *supra*. And a jury verdict in favor of the government would presumably be subject to review only under the deferential standard of *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). In rejecting a double-jeopardy attack on government appeals from sentences, this Court noted that the authority for such appeals "should lead to a greater degree of consistency in sentencing." *United States* v. *DiFrancesco*, 449 U.S. 117, 143 (1980). That added consistency would be lost in a considerable number of cases if the Guidelines were made subject to a judicially created requirement that juries must find sentence-enhancing facts.

3. If the Court were to hold that the Guidelines remain binding and applicable subject to a *Blakely*-required overlay of jury factfinding on facts leading to sentence enhancements, defendants in cases like these could receive a sentencing windfall. A holding that the Guidelines remained binding but that enhancing facts had to be charged in an

indictment and found by the jury would leave the sentencing court unable to take into account all relevant factors at sentencing. For example, regardless of the sentences that are appropriate for their particular crimes and regardless of the life imprisonment and 40-year maximum sentences that Congress established by statute for their respective offenses, Booker could be sentenced to no more than 262 months of imprisonment and Fanfan could be sentenced to no more than 78 months of imprisonment. See pp. 10-11, *supra*. That result cannot be squared with Congress's or the Commission's intent. But if the Court were to hold that *Blakely* applies to the Guidelines and then hold that the constitutional flaw in the Guidelines invalidates the system as a whole in a case such as this, then the district court on remand would impose the sentence, within statutory limits, that is appropriate to the defendant's crime in light of the defined purposes of sentencing and the need to avoid unwarranted disparities, treating the Guidelines as advisory.

CONCLUSION

The Court should hold that *Blakely* does not apply to the Federal Sentencing Guidelines. If the Court concludes that *Blakely* does apply, it should hold that the Guidelines as a whole are inapplicable to respondents' cases, and should remand for the district courts to exercise sentencing discretion within the congressional minimum and maximum terms, treating the Guidelines as advisory.

Respectfully submitted.

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